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No. ———

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

BECTON DICKINSON AND COMPANY,
Petitioner,

v.

UNITED STATES, *ex rel.* DAVID R. SILLER,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is a *qui tam* action under the False Claims Act, 31 U.S.C. §§ 3729 *et seq.*, "based upon" an earlier "public disclosure of allegations or transactions" where the action arises from and rests upon the same essential facts that previously have been publicly disclosed in two civil lawsuits, so that federal subject matter jurisdiction over the *qui tam* action is barred unless the *qui tam* plaintiff is an "original source"?

2. Where the information on which the *qui tam* action is based has been publicly disclosed, may the *qui tam* plaintiff be an "original source" within the meaning of 31 U.S.C. § 3730(e)(4) without having contributed to the earlier public disclosure of that information?

3. May the Government intervene in a *qui tam* action pursuant to 31 U.S.C. § 3730(b) if it fails to comply with the statutory deadline established by Congress for Government intervention?

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PETITION FOR A WRIT OF CERTIORARI

Becton Dickinson and Company ("BD")[1] hereby petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The opinion of the Court of Appeals is reported at 21 F.3d 1339 (4th Cir. 1994), and is reprinted at Appendix A. The opinion of the District Court is reported at 813 F. Supp. 110 (D. Md. 1993), and is reprinted at Appendix B.

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[1] Pursuant to Rule 29.1, the Petitioner, Becton Dickinson and Company, states that it has no parent companies. Petitioner's subsidiaries (other than wholly-owned subsidiaries) are Oncogene Science, Inc., Quidel Corporation, and Nexagen, Inc.

JURISDICTION

The Court of Appeals entered judgment on April 18, 1994. Petitioner invokes the jurisdiction of this Court under 28 U.S.C. § 1254(1). Federal jurisdiction in the District Court was asserted under 28 U.S.C. § 1345 and 31 U.S.C. § 3732(a).

PERTINENT STATUTES

The False Claims Act, 31 U.S.C. §§ 3730(b)(1)-(4), provides:

> (b) ACTIONS BY PRIVATE PERSONS.—(1) A person may bring a civil action for a violation of section 3729 for the person and for the United States Government. The action shall be brought in the name of the Government. The action may be dismissed only if the court and the Attorney General give written consent to the dismissal and their reasons for consenting.
>
> (2) A copy of the complaint and written disclosure of substantially all material evidence and information the person possesses shall be served on the Government pursuant to Rule 4(d)(4) of the Federal Rules of Civil Procedure. The complaint shall be filed in camera, shall remain under seal for at least 60 days, and shall not be served on the defendant until the court so orders. The Government may elect to intervene and proceed with the action within 60 days after it receives both the complaint and the material evidence and information.
>
> (3) The Government may, for good cause shown, move the court for extensions of the time during which the complaint remains under seal under paragraph (2). Any such motions may be supported by affidavits or other submissions in camera. The defendant shall not be required to respond to any complaint filed under this section until 20 days after the complaint is unsealed and served upon the defendant

pursuant to Rule 4 of the Federal Rules of Civil procedure.

(4) Before the expiration of the 60-day period or any extensions obtained under paragraph (3), the Government shall—

(A) proceed with the action, in which case the action shall be conducted by the Government; or

(B) notify the court that it declines to take over the action, in which case the person bringing the action shall have the right to conduct the action.

Section 3730(e)(4) provides:

(4) (A) No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.

(B) For purposes of this paragraph, "original source" means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information.

STATEMENT OF THE CASE

In the decision below, the Fourth Circuit made two rulings that expand the jurisdiction of the District Courts over "*qui tam*" cases under the False Claims Act beyond the strict statutory limits set by Congress. First, it held that a District Court has subject matter jurisdiction over a *qui tam* action even though the allegations upon which

the complaint is based have been disclosed publicly in prior lawsuits, and even though the *qui tam* plaintiff (also known as the relator) played no role in those original public disclosures. The court explicitly rejected decisions of the Courts of Appeal for the Second, Ninth, Tenth and District of Columbia Circuits, which have held that under such circumstances a District Court does not have subject matter jurisdiction.

Second, the Fourth Circuit held that a District Court may not enforce the deadline that Congress imposed on the Government's right to intervene in *qui tam* actions by dismissing an untimely attempt to intervene. Although the False Claims Act expressly provides that if the Government wishes to intervene, it "shall" do so within a specified period of time, the Fourth Circuit determined that what Congress really meant was that the Government may intervene regardless of whether it complies with the statutory deadline—effectively reading the Government's deadline out of the statute.

1. The History Of The False Claims Act

The jurisdictional provisions of the False Claims Act ("the Act") that are at issue in this case may be understood only in light of the Act's history. Congress passed the Act during the Civil War to allow the Government to recover against parties who submitted fraudulent claims. The Act has become the Government's "primary litigative tool for combatting [sic] fraud." Sen. Comm. on Jud., S. Rep. No. 345, 99th Cong., 2d Sess. 2 (1986), *reprinted in* 1986 U.S.C.C.A.N. 5266 ("S. Rep."), 5266. Since it was first enacted, the Act has included "*qui tam*" provisions that allow private individuals to sue on behalf of the United States and to receive a portion of any amount recovered as a bounty.

The original version of the Act did not prohibit *qui tam* claims that were based on information that was already in the public domain. In *United States ex rel.*

Marcus v. Hess, 317 U.S. 537 (1943), this Court ruled that a private plaintiff could pursue a *qui tam* action even if the action were based entirely upon information contained in a public criminal indictment.

Shortly thereafter, in 1943, Congress amended the Act to provide that a District Court would be required to dismiss a *qui tam* case that was based on evidence or information the Government had when the action was brought. The 1943 Amendments thus restricted *qui tam* actions. In *United States ex rel. Wisconsin v. Dean*, 729 F.2d 1100 (7th Cir. 1984), the Seventh Circuit dismissed a *qui tam* case brought by the State of Wisconsin because the State, before filing, had shared its evidence with the Federal Government for joint prosecution. The court ruled that the Government's prior knowledge of the allegations—even though that knowledge came from the *qui tam* plaintiff itself—barred the *qui tam* action. *Id.* at 1104.

In 1986, Congress amended the Act to strike a balance between the permissiveness represented by *Marcus* and the restrictiveness represented by *Dean*. The 1986 Amendments provided that the District Courts do not have subject matter jurisdiction over a *qui tam* action if it is "based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing," unless the action is brought by "an original source of the information." Congress thus retained the ban on *Marcus*-type suits that are based on information that is already in the public domain—often called "parasitic" actions—but created a limited exception for "an original source of the information" to encourage parties, such as the State of Wisconsin, who have brought about public disclosure of alleged fraud. The relevant provisions are contained in 31 U.S.C. § 3730(e)(4) and are sometimes referred to as the "public disclosure bar."

The 1986 Amendments also changed the provisions applicable to the Government's right to intervene in private

qui tam lawsuits. Before 1986, the Act provided that the Government was entitled to proceed with and take control of a *qui tam* action by entering its appearance no more than sixty days after it was notified of the filing of the action. The Act did not then provide that *qui tam* cases would be filed under seal, or that they would be kept secret from the defendant.

In contrast, under the 1986 Amendment, a *qui tam* complaint is kept under seal for an initial period of at least sixty days, and its filing is kept secret from the defendant. The Government may intervene and take control of the case during the sixty day seal period. Alternatively, the Government may, "for good cause shown," move the Court for extensions of the initial sixty-day period during which it may elect whether to intervene, and during any such extensions the case remains sealed. The Act further provides that before the expiration of the sixty-day period or any extensions, the Government "*shall* . . . proceed with the action . . . or . . . notify the Court that it declines to take over the action. . . ." (Emphasis added).

The Senate Judiciary Committee Report on the 1986 Amendments explains these provisions as follows:

> By providing for sealed complaints, the Committee does not intend to affect defendants' rights in any way.
>
> * * * *
>
> Subsection (b)(3) of section 3730 establishes that the government may petition the Court for extensions of both the 60-day evaluatory period and the time during which the complaint remains under seal. *Extensions will be granted, however, only upon a showing of "good cause." The Committee intends that courts weigh carefully any extensions on the period of time in which the Government has to decide whether to intervene and take over the litigation. The Committee feels that with the vast majority of*

> *cases, 60 days is an adequate amount of time to allow Government coordination, review and decision.* Consequently, "good cause" would not be established merely upon a showing that the government was overburdened and had not had a chance to address the complaint.
>
> * * * *
>
> *The Government should not, in any way, be allowed to unnecessarily delay lifting of the seal from the civil complaint* or processing of the *qui tam* litigation.
>
> * * * *
>
> Subsection (b)(4) of section 3730 restates current law which provides that *within the initial 60-day period, or before expiration of any stays granted by the court, the Government must indicate whether it will intervene and proceed with the action or decline to enter.*

S. Rep. at 5289-90 (emphasis added).

The 1986 Amendments have led to an explosion of *qui tam* actions. According to the Department of Justice, as of October 1993, 606 *qui tam* cases had been filed since Congress enacted the 1986 Amendments. The number of filings has been rising steadily, from 32 filed in fiscal year 1987 to 119 filed in fiscal year 1992. *See* "Qui Tam Support," 3 DOJ Alert, No. 12, p. 10 (Prentice Hall), October 4, 1993.

2. The Procedural Background Of This Case

From 1986 until January 1991, the *qui tam* plaintiff in this case, David Siller, worked for Scientific Supply, Inc. ("SSI"), a Texas-based distributor of health care products. SSI's president was Siller's brother, Ruben. SSI distributed products made by the petitioner, BD, until BD cancelled the distributorship agreement in 1987.

In January 1989, SSI sued BD in Texas state court. Its complaint alleged, *inter alia*, that BD had been over-

charging the Government by selling at prices that violated a "Most Favored Customer" clause in BD's contract with the Government, and had concealed its true best prices from the Government.

The SSI lawsuit was the second time that these allegations had been made in public. In December 1987, Statim Laboratory Supply, Inc. ("Statim"), another Texas-based BD distributor, had filed a similar action against BD, also in Texas state court. The District Court opinion below accurately characterized SSI's complaint as a "knock off" of Statim's complaint.[2]

David Siller filed this action in January 1991. His complaint, like the SSI and Statim complaints, alleges that BD concealed its best discounts on certain products from the Government and thereby has been able to overcharge the Government. The District Court found, and the Fourth Circuit affirmed, that "the same essential facts underlay both the SSI suit, and Siller's *qui tam* action." (App. A, 22a; App. B, 39a).

Siller claims that he derived his knowledge of the allegations in the *qui tam* complaint, not from his brother's SSI lawsuit or the Statim lawsuit, but from his employment with SSI. Siller admits that he knew of the existence of the SSI and Statim lawsuits, but claims that he did not read the pleadings in those actions until after BD filed its motion to dismiss in this case. Siller further claims that after he learned about the False Claims Act and its *qui tam* provisions in the Spring of 1990, he conducted his own investigation that uncovered evidence of BD's alleged misdeeds.

Siller disclosed his evidence to the United States on December 27, 1990. He filed this lawsuit on January 4, 1991. Pursuant to the Act's requirements, Siller's complaint remained sealed and was not served on the defend-

[2] Both the Statim and SSI actions were settled before this lawsuit began.

ant, BD, for an initial sixty-day period to give the Government the opportunity to decide whether to intervene in the case.

The Government took twenty-one months to make its decision. Between the time that Siller filed his complaint and the time the Government decided to intervene, the District Court extended the intervention deadline on eight separate occasions, each time in response to a sealed, *ex parte* motion filed by the Government. During this entire period, the sealing order remained in effect, and BD was given no notice of the pending lawsuit against it. There was no opposition to any of the Government's motions for extension of the intervention deadline.

On two occasions, the Government failed to comply with the extended deadline for intervention imposed by the District Court. The first failure occurred when the Government filed its motion to extend the deadline approximately three weeks after the previous deadline had expired. The District Court allowed a "*nunc pro tunc*" extension as requested by the Government. The second time the Government missed its deadline by two days, did not bother to seek a *nunc pro tunc* extension, but was granted an extension anyway.

On October 5, 1992, the Government elected to intervene, and the complaint was unsealed and served on BD. The plaintiffs filed an amended complaint on December 16, 1992. BD moved to dismiss as to both plaintiffs—the Government on the ground it had failed to comply with the sixty-day intervention deadline as extended by the District Court, and Siller on the ground that the District Court did not have subject matter jurisdiction because of the public disclosure bar.

The District Court granted BD's motion. It held that it had been divested of jurisdiction over the Government's claim by the Government's failures to meet the deadline for intervention. It held that it lacked jurisdiction to con-

sider Siller's claim because that claim was based upon the already-public allegations contained in the Statim and SSI complaints, and Siller was not "the original source of the information" as defined in the Act. (App. B, 38a).

The Fourth Circuit reversed as to both plaintiffs. Relying on a broad reading of *Brock v. Pierce County*, 476 U.S. 253 (1986), it held that the statutory requirement that the Government "shall" intervene before the expiration of the sixty-day deadline, as extended by the District Court, did not evidence a "Congressional intention that § 3730(b)(4) serve as a jurisdictional requirement upon the Government in *qui tam* actions." (App. A, 15a). In essence, based on its reading of the Act's legislative history, the Court of Appeals excused the Government from the mandatory intervention deadline imposed by Congress.

The Fourth Circuit also held that Siller's action was not "based upon" the prior disclosures in the SSI suit because the allegations in Siller's complaint had not been shown to have been "actually derived" from the SSI complaint. (App. A, 21a). In reaching that holding, the Fourth Circuit explicitly rejected the contrary holding of the Second Circuit in *United States ex rel. Doe v. John Doe Corp.*, 960 F.2d 318 (2d Cir. 1992), as being supported by neither "reasoning nor supportive case authority." (App. A, 18a). The Fourth Circuit also recognized that its holding was contrary to the decisions of the D.C. Circuit in *United States ex rel. Springfield Terminal Ry. Co. v. Quinn*, 14 F.3d 645 (D.C. Cir. 1994); the Second Circuit in *United States ex rel. Kreindler & Kreindler v. United Technologies Corp.*, 985 F.2d 1148 (2d Cir.), *cert. denied*, 113 S. Ct. 2962 (1993); and the Tenth Circuit in *United States ex rel. Precision Co. v. Koch Industries, Inc.*, 971 F.2d 548 (10th Cir. 1992), *cert. denied*, 113 S. Ct. 1364 (1993). (App. A, 20a).

The Fourth Circuit went on to hold that even if Siller's action were "based upon" the SSI suit, Siller was an

"original source of the information," thus authorizing the District Court to exercise subject matter jurisdiction. In reaching that holding, the Fourth Circuit explicitly rejected the contrary holdings of the Second Circuit in *United States ex rel. Dick v. Long Island Lighting Co.*, 912 F.2d 13 (2d Cir. 1990), and the Ninth Circuit in *Wang v. FMC Corp.*, 975 F.2d 1412 (9th Cir. 1992), labeling those holdings as "not merely unpersuasive, but implausible." (App. A, 26a).

REASONS FOR GRANTING THE PETITION

I. THE COURT SHOULD RESOLVE THE DIRECT CONFLICTS AMONG THE CIRCUITS WITH RESPECT TO THE MEANINGS OF THE STATUTORY TERMS "BASED UPON" AND "ORIGINAL SOURCE."

The False Claims Act is an important statute—the Government's "primary litigative tool for combatting [sic] fraud." (S. Rep. at 5266). When Congress amended the *qui tam* provisions of the Act in 1986, it was attempting to strike a balance that would permit parties who publicly disclosed wrongdoing for the first time—that is, "original sources"—to bring their information to the Government's attention and be rewarded, while prohibiting parasitic actions based on information that was already in the public domain. Congress' attempt to strike that balance has led to a great deal of litigation about the meaning of the statutory language. Two of the main areas of disagreement among the Circuits, sharply focused by the Fourth Circuit's opinion in this case, are the meanings of the terms "based upon" and "original source of the information," which are central to the Act's jurisdictional limitations on private *qui tam* actions. This case presents the Court with the opportunity to spell out definitively the meanings of those terms, thereby resolving two conflicts in the Circuits and eliminating the need for repetitive litigation over the meaning of the Act's jurisdictional provisions.

A. The Court should resolve the conflict over the meaning of the term "based upon."

This case presents a direct conflict between the Circuits as to the meaning of the term "based upon" in § 3730(e)(4). In *John Doe Corp.*, the Second Circuit held that a *qui tam* action is "based upon" a public disclosure—and thus barred by lack of subject matter jurisdiction unless saved by the "original source" exception—when the allegations are "the same as those that have been publicly disclosed . . . regardless of where the plaintiff obtained his information." 960 F.2d at 324. *Accord*, *Kreindler*, 985 F.2d at 1158 (quoting *John Doe Corp.* with approval); *Precision*, 971 F.2d at 552 ("'based upon' is properly understood to mean as 'supported by'"). *See also Springfield Terminal Ry. Co.*, 14 F.3d at 654 (Congress sought to prohibit *qui tam* actions when allegations of fraud or critical elements of a fraudulent transaction "were in the public domain"). The Fourth Circuit rejected those holdings and held that a *qui tam* action is barred "only where the relator has *actually derived* from [the previous public] disclosure the allegations upon which his *qui tam* action is based." (App. A, 18a) (emphasis added).

The Fourth Circuit's decision to reject the holdings of *John Doe Corp.* and the other cases creates a conflict that goes to the very heart of the *qui tam* provisions of the Act. Under the Fourth Circuit's decision, courts in the Fourth Circuit have broader subject matter jurisdiction than courts in other circuits, and cases that could not be brought in other circuits will be litigated and tried in the Fourth Circuit.

In addition to creating a conflict between the circuits, the Fourth Circuit's reading of the statutory term "based upon" threatens to overburden the District Courts. Under the holdings of all of the Circuits other than the Fourth Circuit, a District Court's job in assessing its jurisdiction to hear a *qui tam* case is straightforward and objec-

tive: It must determine whether there has been a prior public disclosure of the allegations that form the basis of the *qui tam* complaint in a civil, criminal, or administrative hearing, in the news media, or in certain other settings. If there was a prior disclosure, then the case must be dismissed.

Under the Fourth Circuit's holding, in contrast, a District Court is required to conduct an evidentiary hearing into the highly subjective issue of whether the plaintiff "actually derived" his knowledge from a prior public disclosure, or whether it came from some other source. As this case is likely to show, it is extremely difficult in a case of any complexity to determine precisely how an individual acquired the facts that form the basis of a complaint. Nothing in the statutory language suggests that Congress intended to require a preliminary evidentiary inquiry into what is essentially a collateral matter.

Moreover, the Fourth Circuit's decision potentially reads the term "based upon"—a jurisdictional limitation—out of the statute. For example, even if an allegation of fraud were disclosed in the news media, it would be difficult for a defendant to show that a plaintiff "actually derived" his or her complaint from that disclosure. The plaintiff would simply have to disclaim any awareness of that disclosure—just as Siller denies having previously reviewed the pleadings in the SSI and Statim cases. A plaintiff determined to obtain a windfall from a parasitic action could virtually always identify some basis, other than a prior public disclosure, that conceivably could have contributed to his lawsuit. Thus, under the Fourth Circuit's analysis, the issue in all cases ultimately will focus on *not* what the relator *actually* knew, but what he could have had access to and can claim knowledge of.

In short, the Fourth Circuit has effectively designated itself as an "enterprise zone" for enterprising plaintiffs who wish to file *qui tam* suits based on public informa-

tion, free from the "based upon" jurisdictional restriction that applies in other Circuits. This is directly contrary to the statute's purpose of encouraging relators to come forward *before* information is public.

The jurisdictional provisions contained in Section 3730(e)(4) are not a model of clarity. The meaning of the term "based upon" has been the subject of ten Circuit Court opinions since 1990.[3] In the eight years since Congress amended the Act, the jurisdictional provisions contained in § 3730(e)(4) have given rise to fourteen reported Circuit Court decisions and seventeen reported District Court decisions.[4] In many of these cases the

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[3] *See Siller*, 21 F.3d 1339; *Cooper v. Blue Cross and Blue Shield of Florida, Inc.*, 19 F.3d 562 (11th Cir. 1994); *Springfield Terminal Ry. Co.*, 14 F.3d 645; *Kreindler*, 985 F.2d 1148; *Wang*, 975 F.2d 1412; *Precision*, 971 F.2d 548; *John Doe Corp.*, 960 F.2d 318; *United States ex rel. Stinson, Lyons, Gerlin & Bustamante, P.A. v. Prudential Ins. Co.*, 944 F.2d 1149 (3d Cir. 1991); *United States ex rel. Williams v. NEC Corp.*, 931 F.2d 1493 (11th Cir. 1991); *United States ex rel. Hagood v. Sonoma County Water Agency*, 929 F.2d 1416 (9th Cir. 1991).

[4] *See* footnotes 3, *supra*, and 5, *infra*, which list the Circuit Court decisions. In addition to the reported District Court decisions that led to Circuit Court decisions noted above, the District Court decisions are *United States ex rel. Fine v. University of California*, 821 F. Supp. 1356 (N.D. Cal. 1993); *United States ex rel. Stone v. Rockwell Intern. Corp.*, 144 F.R.D. 396 (D. Colo. 1992); *United States ex rel. Hartigan v. Palumbo Bros., Inc.*, 797 F. Supp. 624 (D. Ill. 1992); *United States ex rel. Givler v. Smith*, 760 F. Supp. 72 (E.D. Pa. 1991); *United States ex rel. McDowell v. McDonnell Douglas Corp.*, 755 F. Supp. 1038 (M.D. Ga. 1991), *aff'd*, 999 F.2d 1583 (11th Cir. 1993); *United States ex rel. Stinson, Lyons, Gerlin & Bustamante, P.A. v. Blue Cross Blue Shield of Georgia, Inc.*, 755 F. Supp. 1040 (S.D. Ga. 1990); *United States v. CAC Ramsay, Inc.*, 744 F. Supp. 1158 (S.D. Fla. 1990), *aff'd*, 963 F.2d 384 (11th Cir. 1992); *United States v. Rockwell Intern. Corp.*, 730 F. Supp. 1031 (D. Colo. 1990); *United States ex rel. Stinson, Lyons, Gerlin & Bustamante, P.A. v. Provident Life & Accident Ins. Co.*, 721 F. Supp. 1247 (S.D. Fla. 1989); *Erickson ex rel. United States v. American Inst. of Biological Sciences*, 716

courts have found it necessary to perform an extensive analysis of legislative history to divine Congress' intent. The large volume of *qui tam* litigation, the statute's lack of clarity, and the conflicts among the Circuits all combine to mean that disputes over the meaning of the statutory terms are likely to recur until this Court settles them.

B. The Court should resolve the conflict over the meaning of the term "original source."

The Court also should grant certiorari to address the conflict in the Circuits created by the Fourth Circuit's decision as to the meaning of the term "original source." Before the Fourth Circuit's decision in this case, both the Second and Ninth Circuits had ruled, based on a careful reading of the statutory language and legislative history, that an "original source" had to be truly "original"—that is, that an original source must have been a source that contributed to the *original* public disclosure, and not simply a source that echoed that disclosure to the Government. *See United States ex rel. Dick v. Long Island Lighting Co.*, 912 F.2d at 16; *Wang v. FMC Corp.*, 975 F.2d at 1418.

The Fourth Circuit held those cases to be "not merely unpersuasive, but implausible." (App. A, 26a). It held instead that so long as the *qui tam* plaintiff is the first source to the *Government*, it does not matter whether he or she played any role at all in the initial public disclosure of the allegations of wrongdoing. Under the Fourth Circuit's ruling, even if a matter has been widely publicized, a *qui tam* plaintiff who contributed nothing to the public disclosure of the alleged wrongdoing may simply qualify as an "original source" by demonstrating "direct and independent" knowledge of the information involved in the case.

F. Supp. 908 (E.D. Va. 1989); *United States ex rel. LaValley v. First National Bank of Boston*, 707 F. Supp. 1351 (D. Mass. 1988).

Neither the language nor the legislative history of the Act supports permitting a plaintiff who does nothing until after allegations of wrongdoing are public to bring a *qui tam* action. Such an individual is not a whistle-blower. As the Ninth Circuit aptly stated in *Wang*, "*Qui tam* suits are meant to encourage insiders privy to a fraud on the government to blow the whistle on the crime. In such a scheme, there is little point in rewarding a second toot." *Wang*, 975 F.2d at 1419. Congress' response to the *Marcus* decision supports the Ninth Circuit's rejection of the second toot.

Many of the reasons that support the grant of certiorari to resolve the meaning of the term "based upon" also support grant of certiorari to resolve this issue. As a result of the Fourth Circuit's decision, District Courts in the Fourth Circuit have broader subject matter jurisdiction than those in other Circuits. There has been a great deal of litigation with regard to the meaning of the term "original source"—eleven Circuit Court opinions since 1986.[5] That litigation is likely to continue and increase as more cases are filed under the *qui tam* provisions of the False Claims Act. And, as is the case with the term "based upon," the Circuit Courts have struggled with the meaning of the statutory language Congress used to create the "original source" exception.

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[5] *See Siller*, 21 F.3d 1339; *Cooper*, 19 F.3d 562; *Springfield Terminal Ry. Co.*, 14 F.3d 645; *United States ex rel. Barajas v. Northrop Corp.*, 5 F.3d 407 (9th Cir. 1993), *cert. denied*, 114 S. Ct. 1543 (1994); *Kreindler*, 985 F.2d 1148; *Wang*, 975 F.2d 1412; *Precision*, 971 F.2d 548; *United States ex rel. Stinson, Lyons, Gerlin & Bustamante, P.A. v. Prudential Ins. Co.*, 944 F.2d 1149; *United States ex rel. LeBlanc v. Raytheon Co.*, 913 F.2d 17 (1st Cir. 1990); *Dick*, 912 F.2d 13; *Houck on Behalf of United States v. Folding Carton Admin. Committee*, 881 F.2d 494 (7th Cir. 1989), *cert. denied, sub nom., Certified Plaintiff Class in MDL-250 v. Folding Carton Reserve Fund*, 494 U.S. 1026, 1027, *and cert. denied, sub nom., In re Will*, 494 U.S. 1025 (1990).

II. THE COURT SHOULD DETERMINE WHETHER THE GOVERNMENT MAY INTERVENE IN A *QUI TAM* ACTION IF IT FAILS TO COMPLY WITH THE STATUTORY DEADLINE FOR INTERVENTION.

The intervention deadline set forth in 31 U.S.C. § 3730(b) is a jurisdictional provision, setting forth the limited conditions upon which the Government may intervene in a *qui tam* action.[6] The Government in this case failed to comply with that jurisdictional provision—not just once, but twice. Yet the Fourth Circuit, in reliance on *Brock v. Pierce County*, held that those failures —and indeed the statutory intervention deadline itself—were meaningless, a result contrary to the plain language of the statute and Congress' clearly expressed intent. This Court should review this aspect of the Fourth Circuit's decision to establish the limits of the *Pierce County* doctrine.

In *Pierce County*, the Court set standards for determining when courts should condone governmental actions that violate mandatory timing requirements imposed by Congress. Mere acts of negligence by federal employees, the Court reasoned, should not impair the Government's ability to act in the public interest absent evidence that Congress intended such a result. Thus, the Court held that, even where a statute uses mandatory terms such as "must" or "shall", a broader contextual analysis is needed to determine whether the deadline is enforceable. The ultimate question is whether Congress intended to bar belated governmental action, a question to be resolved through normal methods of statutory construction.

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[6] Traditionally, "jurisdictional" bars are those in which the legislature has established mandatory, non-waivable preconditions for suit, appeal, or other recourse for judicial relief. *See Hallstrom v. Tillamook County*, 493 U.S. 20, 31 (1989) (citing *Fair Assessment in Real Estate Assn., Inc. v. McNary*, 454 U.S. 100, 137 (1981) (Brennan, J., concurring)).

Both in theory and in practice, the *Pierce County* doctrine blunts the impact of Congressional directives over executive action. Congressional drafters may well believe that the use of mandatory language is sufficient to compel and ensure agency compliance, but unless that objective is supplemented by clear intrinsic or extrinsic context, courts presume to the contrary. Because the *Pierce County* doctrine places a heavy burden on Congress to indicate when its deadlines and requirements on the executive branch are fully enforceable, a broad application of the doctrine may infringe upon Congressional authority. It is, therefore, critical that the doctrine's limits be respected and its balance of interests preserved.

This case provides the Court with an opportunity to clarify the limits of *Pierce County*. The Court of Appeals' decision to disregard the sixty-day period in 31 U.S.C. § 3730(b) for the Government to decide whether to intervene in a *qui tam* action or seek an extension from the court dangerously extends *Pierce County*'s limits for determining when statutory deadlines for the Government are enforceable.

Pierce County emphasized that jurisdictional time periods could be enforced against non-compliance by the Government so long as Congressional intent was evidenced through any normal method of divining legislative will—by express statutory penalties, legislative history or other traditional indicia. The Court of Appeals has expanded this holding into a broad proscription against enforcing *any* statutory deadline unless Congress unequivocally establishes the consequences of non-compliance in the statute or the legislative history. This analysis ignores the obvious fact that 31 U.S.C. § 3730(b), which defines how the Government may intervene in a lawsuit filed by someone else, is by its very nature a jurisdictional statute.[7] By requiring formal proof of the penalty, rather

[7] Ordinarily, jurisdictional deadlines have been fully enforced against the Government, be they statutes of limitations, *United*

than substantive analysis of the overall statutory framework, the Court of Appeals has pushed *Pierce County* into uncharted terrain, where Congressional will may be overridden merely because its proscriptive contours were not precisely delineated.

The *Pierce County* decision contains no indication that its permissive non-compliance rule rests on the existence of formal sanctions by Congress. For instance, it expressly *declined* to adopt the holdings of several Circuits requiring such specificity, even as it borrowed from their analyses. *See* 476 U.S. at 259 ("The Court has never expressly adopted the Circuit precedent upon which the Secretary relies"), *distinguishing St. Regis Mohawk Tribe v. Brock*, 769 F.2d 37, 41 (2d Cir. 1985), *cert. denied*, 476 U.S. 1140 (1986); *Fort Worth National Corp. v. Federal Savings & Loan Ins. Corp.*, 469 F.2d 47, 58 (5th Cir. 1972); and cases cited at *id.* n.6. Later in the decision, the Court again emphasized the limited nature of its holding:

> We need not, and do not, hold that a statutory deadline can never bar later action unless that consequence is stated explicitly in the statute. In this case, we need not go beyond the normal indicia of Congressional intent to conclude that [the statute] permits the Secretary to recover misspent funds after the 120-day deadline has expired.

476 U.S. at 262 n.9. Thus, throughout the opinion, the Court reiterated that its principal thrust was to prevent a rigid policy on the other extreme, *i.e.*, to ensure that "every failure of an agency to observe a procedural re-

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States v. Core Laboratories, Inc., 759 F.2d 480 (5th Cir. 1985), or deadlines for noting an appeal, *United States v. One Remington 12 Gauge Shotgun*, 709 F.2d 1468, 1469 (11th Cir. 1983). False Claims Act actions brought by the United States thus have been barred for failure to comply with the applicable statute of limitations. *See, e.g., Blusal Meats, Inc. v. United States*, 638 F. Supp. 824 (S.D.N.Y. 1986), *aff'd*, 817 F.2d 1007 (2d Cir. 1987).

quirement" does not "void[] subsequent agency action[.]" *Id.* at 260.[8]

The critical issue in *Pierce County*, therefore, was whether Congress intended the deadline as a jurisdictional bar, *not* whether Congress explicitly declared the consequences of non-compliance. References to such jurisdictional concerns abound throughout the decision.[9] As a practical matter, this test should focus on whether "depriving the agency of its power to act [i]s a remedy which would thwart the statutory purpose." *Sierra Pacific Industries v. Lyng*, 866 F.2d 1099, 1122 (9th Cir. 1989). *See* 476 U.S. at 265 (Congressional intent to provide Secretary with "maximum authority" was inconsistent with absolute cut-off of 120 days).

While 31 U.S.C. § 3730(b) does not specify any penalty or consequence for non-compliance, it most certainly functions as a jurisdictional bar, and on its face was intended by Congress as such. The Court of Appeals' contrary holding in this case, while purporting to apply *Pierce County*, dwelt primarily on the negatives of Congressional intent: the absence of an express sanction

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[8] *See also id.* at 260 ("courts should not assume that Congress intended the agency to lose its power to act"); at 262 ("We hold, therefore, that the mere use of the word "shall" . . . , standing alone, is not enough to remove the Secretary's power to act"); and *id.* at 266 (statutory requirement that "the Secretary 'shall' take action within 120 days does not, standing alone, divest the Secretary of jurisdiction to act after that time").

[9] *See id.* at 262 ("Thus, even under respondent's theory, [the statute] cannot be jurisdictional"); at 265 (the statute "was clearly intended to spur the Secretary to action, not to limit the scope of his authority"); 265 (discussing whether statute "establish[es] a jurisdictional bar"); and 266 (statute "does not divest the Secretary of jurisdiction to act"). A number of lower court decisions, although certainly not all, have understood *Pierce County* to have held that the statutory time limit was not "jurisdictional". *See, e.g., Gallagher v. Nat'l Transp. Safety Bd.*, 953 F.2d 1214, 1222 (10th Cir. 1992); *South Carolina v. United States Dept. of Labor*, 795 F.2d 375, 377 (4th Cir. 1986).

(App. A, 10a), and the absence of any legislative history discussing specific remedies (App. A, 12a). Its treatment of other factors—the supposed existence of less severe remedies and a broad construction of Congressional intent in favor of lengthy investigations (App. A, 11a-12a)—is subsidiary to the other issues and, as discussed below, directly at odds with the key facts that (1) a defendant, such as BD, has no lesser remedies, and (2) Congress was strongly opposed to unnecessary delays by the Government. The decision below thus clearly stands for the proposition that the deadline may be overridden because Congress did not expressly provide otherwise.

A broader and more substantive reading of the statute and the legislative history reveal a much different picture of Congressional intent.

First, the Act itself provides strong evidence that Congress intended the sixty-day limit to be enforced by the courts. The deadline functions as a jurisdictional trigger for the Government, setting forth the limited conditions under which the Government may intervene in a *qui tam* proceeding. Thus, the Act expressly states that one of two events *must* occur "[b]efore the expiration of the 60-day period or any extensions": either the Government "shall" proceed with the action, or it "shall" notify the court of its decision to decline to intervene. 31 U.S.C. § 3730(b)(4). Moreover, the statute already places a stringent "good cause" burden on the Government to obtain an extension beyond sixty days, affirming Congress' intent that the sixty-day period be enforced by the judiciary, and that it be enforced with rigor, not open-ended diffidence.

Second, the legislative history confirms this larger jurisdictional objective. Unlike the statute at issue in *Pierce County*, the legislative record of the False Claims Act is clear in establishing that Congress intended to limit the Government's inordinate power over sealed, secret *qui tam* complaints, and that Congress relied on a narrowly

circumscribed right of intervention, primarily through the sixty-day deadline, as a check on that authority. Numerous comments were made in the Senate Judiciary Committee Report:

(1) "By providing for sealed complaints, the committee does not intend to affect defendants' rights in any way."

(2) "Extensions [of the sixty-day evaluatory period] will be granted, however, *only* upon a showing of *good* cause."

(3) "The Committee intends that courts *weigh carefully* any extensions on the periods of time in which the Government has decided to intervene[.]"

(4) "The Committee feels that with the vast majority of cases, sixty days is an adequate amount of time to allow Government coordination, review and decision."

(5) "[G]ood cause would not be established merely upon a showing that the Government was overburdened and had not had a chance to address the complaint."

(6) "The Government should not, *in any way*, be allowed to unnecessarily delay lifting of the seal from the civil complaint or processing of the qui tam litigation."

(7) "[*W*]*ithin* the initial sixty-day period, or before expiration of any stays granted by the court, the Government *must indicate* its decision[.]"

(S. Rep. at 5289-90) (emphasis added).

The clear expression of Congressional intent that the Government would make its decision within sixty days (or more if good cause were shown within that time) cannot be reconciled with the Court of Appeals' conclusion that "this passage simply does not address the par-

ticular question of what remedy should be afforded where the government does delay." (App. A, 12a). Thus, this case directly pivots on the key question left unanswered by *Pierce County*: is it sufficient for Congress to adopt a clear jurisdictional time limit for agency action, or must it *also* expressly state that the remedy for non-compliance is dismissal? [10]

The *qui tam* procedures of the False Claims Act provide a dangerous setting for expansion of *Pierce County*. Contrary to the Court of Appeals' skepticism that the Government's delay might cause BD any cognizable injury (*see* App. A, 11a), these provisions of the False Claims Act flirt perilously with the outer limits of due process. A *qui tam* complaint is filed under seal and cannot be disclosed until *after* the Government concludes its investigation. Unless checked by the sixty-day provision and the narrow grounds for good cause extension, the Government can delay its intervention decision until it has already concluded its trial preparation. Here, the Government obtained *eight successive extensions* to create a *twenty-one month* delay. The entirely secret, *ex parte* nature of the "good cause" motions under 31 U.S.C. § 3730(b)(3) accords only the slimmest of *post hoc*

[10] In this regard, contrary to the Court of Appeals' analysis, *BD* enjoys *no* remedy other than dismissal for the Government's non-compliance. The Fourth Circuit pointed to two purportedly "less extreme" remedies: (1) an order compelling the government to comply; or (2) a ruling that non-compliance was equivalent to a decision not to intervene at that time. (App. A, 11a). Those "remedies" were not available to *BD*, which at the time was a captive defendant unaware of and thus unable to participate in any way in the *in camera* proceeding brought against it. The fact that the trial court or the *qui tam* plaintiff had remedies hardly excuses the injury to a False Claims Act defendant caught in a secret, Star Chamber-like vise. Indeed, the Fourth Circuit's second alleged remedy is an ironic one, as it would permit the *qui tam* plaintiff to obtain an order cutting off the Government's right to intervene, which in effect is what the Fourth Circuit held the District Court could not do at the request of the defendant.

rights to challenge retroactively the propriety of any "good cause" adjudication. Moreover, the False Claims Act is itself a uniquely harsh statute, which imposes severe penalties ($10,000 per false claim plus treble damages); yet, the very secrecy afforded to *qui tam* complaints deprives a defendant of notice and opportunity to make any changes in its conduct to conform to the Act and halt a build-up of damages pending the Government's decision. The Act's procedural deadlines thus offer vital protection for otherwise powerless defendants, not a mere spur to quicker agency action.

In sharp contrast, barring the Government's right to intervene would not cause direct injury to the public. Even if the Government were barred from entering the case, and assuming that such a bar would also preclude the Government from subsequently intervening or filing a direct action on its own, claims under the Act may still be brought by a proper *qui tam* plaintiff. The Government's fundamental right of recovery under the Act is the same regardless of whether or not it intervenes.

Due process is certainly challenged by a statutory mechanism that permits the Government to conceal an *in camera* complaint seeking massive quasi-criminal penalties until it investigates every conceivable fact and issue. *See, e.g., Landis v. North American Co.*, 299 U.S. 248, 255-57 (1936) (extended stays are unconstitutional except in cases "of extraordinary public moment"). Here, where Congressional efforts to afford defendants at least some procedural protection have been held unenforceable by the Court of Appeals, those limits have been crossed.

The Court should therefore grant *certiorari* to determine whether the *Pierce County* doctrine renders all jurisdictional bars by Congress against agency action unenforceable unless sanctions for non-compliance are expressly set forth in statute or legislative history,[11] or

[11] As the Court of Appeals' decision indicates, the Court's most recent decision in this area leaves the question open. *See United*

whether the jurisdictional "design and function of the statute" may provide the basis for determining the enforceability of a mandatory deadline, as the Court suggested in *United States v. Montalvo-Murillo*, 495 U.S. 711, 719 (1990).

States v. James Daniel Good Real Property, 114 S. Ct. 492, 506 (1993) (discussed in App. A, 11a-12a n.5). Lower courts have divided on the issue. *Compare Meliezer v. Resolution Trust Co.*, 952 F.2d 879, 883 (5th Cir. 1991) (adopting *Fort Worth* express penalty test), *with Gazly v. Busey*, 819 F. Supp. 29, 31 (D.D.C. 1993) (finding Congressional intent to enforce mandatory deadline on basis of clear Congressional goal to eliminate agency delays), *with Sierra Pacific*, 866 F.2d at 1112 (finding equitable middle ground).

CONCLUSION

For the foregoing reasons, this Court should grant a writ of certiorari to the United States Court of Appeals for the Fourth Circuit to resolve the conflicts among the Circuits and the important issues presented in this Petition.

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 93-1275, No. 93-1459

UNITED STATES OF AMERICA, *ex rel.* DAVID R. SILLER,
Plaintiff/Appellant,

and

UNITED STATES OF AMERICA,
Plaintiff,

v.

BECTON DICKINSON & COMPANY, By and through its Microbiology Systems Division,
Defendant-Appellee,

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

and

UNITED STATES OF AMERICA, *ex rel.* DAVID R. SILLER,
Plaintiff,

v.

BECTON DICKINSON & COMPANY, By and through its Microbiology Systems Division,
Defendant-Appellee.

February 9, 1994, Argued

April 18, 1994, Decided

Appeals from the United States District Court
for the District of Maryland, at Baltimore.
Frederic N. Smalkin, District Judge. (CA-91-33-S)

REVERSED IN PART, VACATED IN PART, AND REMANDED

Before LUTTIG, Circuit Judge, CHAPMAN, Senior Circuit Judge, and WILSON, United States District Judge for the Western District of Virginia, sitting by designation. Judge Luttig wrote the opinion, in which Senior Judge Chapman and Judge Wilson joined.

OPINION

LUTTIG, Circuit Judge:

We interpret in this appeal several provisions of the *qui tam* section of the False Claims Act, 31 U.S.C. § 3729 *et seq.*

Appellant David Siller, the brother and employee of a former distributor of Becton Dickinson & Company products, brought a civil *qui tam* action under 31 U.S.C. § 3730 against Becton Dickinson & Company, alleging that the company had a practice of overcharging the government. The government ultimately elected to intervene in and proceed with the case pursuant to 31 U.S.C. § 3730(b)(2)-(b)(4). On Becton Dickinson & Company's motion, the district court dismissed the government as a party plaintiff, holding that the government's failure to comply with section 3730(b)(4)'s timely intervention requirement barred the government from proceeding. The district court also dismissed Siller's action under section 3730(e)(4), holding that it was "based upon" publicly disclosed allegations. The government and Siller appeal the district court's order dismissing their complaints. For the reasons that follow, we vacate the district court's

dismissal order and remand for further proceedings with the government and Siller reinstated as plaintiffs.

I.

From January 1986 until the filing of this lawsuit in January 1991, David Siller was employed at various times, and in various capacities by Scientific Supply, Inc. (SSI), a San Antonio, Texas, distributor of health care products whose president was Siller's brother, Ruben Siller. SSI was an authorized distributor of medical device products manufactured by Becton Dickinson & Company (BD) until BD canceled its distributorship agreement in 1987.

In 1989, SSI filed suit against BD in Texas state court, asserting various causes of action arising from BD's allegedly wrongful termination of its distributorship agreement. The thrust of SSI's complaint was that BD canceled SSI's distributorship because it feared that SSI, which was seeking to sell BD products to the federal government at prices below those quoted by BD itself, would disclose that BD was overcharging the government. *See* J.A. at 91-99.[1] BD ultimately settled with SSI in September 1989. As part of the settlement agreement, Ruben Siller agreed to keep the existence and terms of the settlement confidential. David Siller, however, Ruben's brother and employee, was not similarly bound by the settlement agreement.

David Siller filed the instant *qui tam* suit against BD in January 1991. According to Siller, he originally learned that BD overcharged the government through his employment with SSI, not as a result of SSI's suit against

[1] SSI's complaint actually mirrored a complaint that Statim Laboratory Supply, Inc. (SLS), another medical products distributor headquartered in San Antonio, Texas, filed against BD in 1987 after BD terminated SLS's distributorship agreement. *See* J.A. at 79-89. SLS's suit apparently was settled in 1990, before trial on the merits.

BD. In fact, Siller asserts, he obtained this knowledge before the SLS and SSI complaints were filed and had not read those complaints until BD filed its motion to dismiss in January 1993. Siller contends that he learned about the False Claims Act (FCA) and its *qui tam* provisions in the spring of 1990, after his brother's company's suit against BD was settled, and that he subsequently conducted his own investigation which uncovered evidence revealing how BD overcharged the government and attempted to conceal those overcharges. Siller then retained counsel and, on December 27, 1990, as required by section 3730(b)(2), voluntarily disclosed the evidence he had garnered regarding BD's overcharging practices to the Office of Inspector General for the Department of Veterans' Affairs, the agency BD allegedly overcharged. Siller filed his lawsuit against BD on January 4, 1991. Pursuant to the FCA's requirements, *see id.*, Siller's complaint remained under seal until the government decided whether to proceed with the case.

The government's decision was 21 months in coming. Between Siller's filing of the lawsuit and the government's ultimate decision to intervene, the government moved for, and received, eight extensions of time in which to consider whether to intervene. *See* 31 U.S.C. § 3730 (b)(3). On two occasions, the government failed to comply even with the court's extended deadline.

The government first missed its March 4, 1992, deadline. Although the Assistant United States Attorney (AUSA) investigating the matter claims to have "made sure" the government's motion for an extension of time was placed in the district court's night filing box on March 4, 1992, Supp. J.A. at 36-37, the motion apparently was never processed by the clerk's office, and there is no record of the motion ever having been filed. When, three weeks later, the court notified the government that it had not received any papers before the March 4 deadline, the AUSA filed a motion for a *nunc pro tunc* ex-

tension of time, which Judge Legg granted on March 27, 1992.

The government subsequently failed to meet its August 3, 1992, deadline for electing whether to intervene, not filing its motion for another extension of time until August 5, 1992. Judge Legg again granted the government's motion, allowing the government until October 5, 1992, to make its decision. On October 5, the government filed a notice of election to intervene and notice of appearance, and the complaint was unsealed.

BD moved on January 19, 1993, to dismiss the case. On February 10 Judge Smalkin, to whom the case had been re-assigned, granted BD's motion. Judge Smalkin dismissed the government as a party plaintiff, holding that each of the government's two previous failures to meet its deadlines violated the FCA's mandatory timely intervention requirement, *see* 31 U.S.C. § 3703(b)(4), divesting the court of its jurisdiction over the government's complaint. Judge Smalkin also held that Siller's action was barred under section 3730(e)(4) because it was "based upon" the prior public disclosure of allegations that BD overcharged the government which appeared in SSI's 1989 lawsuit against BD. Judge Smalkin thereafter denied the government's motion to alter or amend its judgment, and ordered the action dismissed.

II.

We first address the government's claim that the district court erred in dismissing it as a party plaintiff. Whether the government's failure to comply with section 3730(b)(4)'s timeliness requirement jurisdictionally bars the government from proceeding with the case is a question of first impression in this, or any other, federal circuit.[2] Section 3730 of the False Claims Act provides that

[2] In *Erickson ex rel. United States v. American Institute of Biological Sciences*, 716 F. Supp. 908 (E.D. Va. 1989), the district court for the Eastern District of Virginia held that a private re-

private persons may bring civil *qui tam* actions for alleged violations of the FCA. 31 U.S.C. § 3730(b). Under this provision, a *qui tam* plaintiff is instructed to serve on the government his complaint and written disclosure of material evidence. 31 U.S.C. § 3730(b)(2). The government then has 60 days, during which time the relator's complaint is filed *in camera* and remains under seal, within which to elect whether to intervene and proceed with the case, *id.*, although the government may, for good cause shown, move the court for extensions of time, 31 U.S.C. § 3730(b)(3). Section 3730(b)(4) further requires that

> [b]efore the expiration of the 60-day period or any extensions obtained under [section 3730(b)(3)], the Government shall—
>
> > (A) proceed with the action, in which case the action shall be conducted by the Government; or
> >
> > (B) notify the court that it declines to take over the action, in which case the person bringing the action shall have the right to conduct the action.

31 U.S.C. § 3730(b)(4).

The district court found that the government failed to prove that it had actually filed papers with the clerk's office on or before its March 4, 1992, and August 3, 1992, deadlines. Construing section 3730(b)(4) as a mandatory jurisdictional timeliness requirement, it held that each of the government's two failures to comply with that section divested the court of jurisdiction over the government's complaint, and ordered the United States dismissed.

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lator's failure to comply with the requirements set forth in section 3730(b)(2) warranted dismissal of the case. The court did not address, however, the application of section 3730(b)(4) to untimely filings by the government.

The government, evidently conceding that it failed to meet its March 4, 1992, and August 3, 1992, deadlines, contends that section 3730(b)(4) is not a jurisdictional requirement, and therefore that its failure to comply with that section's timely intervention directive did not bar Judge Legg from excusing the government's untimeliness and allowing it to proceed. Under an established line of authority implicitly approved by the Supreme Court in *Brock v. Pierce County*, 476 U.S. 253 (1986), the government argues, a government employee's failure to meet a statutory deadline does not bar further government action unless Congress has, as it has not in section 3730 (b)(4), expressly specified such a consequence for the government's tardiness. BD responds that *Pierce County* is not controlling, and that the courts must enforce section 3730(b)(4)'s unambiguous timeliness requirement by dismissing the government for noncompliance. We agree with the government that *Pierce County* controls this case and, although for reasons slightly different from those advanced by the government, hold that *Pierce County* requires us to read section 3730(b)(4) as a non-jurisdictional statutory deadline.

The Supreme Court in *Pierce County* considered the question whether the government's noncompliance with the Comprehensive Employment and Training Act (CETA) requirement that the Secretary of Labor "shall" issue a final determination as to the misuse of CETA funds within 120 days after receiving a complaint alleging such misuse, 29 U.S.C. § 816(b) (1976 ed., Supp. V), divested the Secretary of his power later to recover the allegedly misused funds. In ruling that it did not, the Supreme Court refused to embrace either of the polar textual arguments advanced by the parties.

On the one hand, the Court rejected the reasoning of the Court of Appeals decision it was reviewing, which reasoning was championed by the county in that case and is relied upon here by BD, that Congress' use of the word "shall" in section 816(b) itself manifests a conclu-

sive intent that noncompliance with the statutory deadline be a jurisdictional bar to later governmental action. 476 U.S. at 262. Repeating its "frequently articulated . . . 'great principle of public policy, applicable to all governments alike, which forbids that the public interests should be prejudiced by the negligence of the officers or agents to whose care they are confided,'" *id.* at 260 (quoting *United States v. Nashville, C. & St. L. Ry. Co.*, 118 U.S. 120, 125 (1886)) (other citations omitted); *see Office of Personnel Management v. Richmond*, 496 U.S. 414, 433 (1990) ("It ignores reality to expect that the Government will be able to 'secure perfect performance from its hundreds of thousands of employees scattered throughout the continent.'") (quoting *Hansen v. Harris*, 619 F.2d 942, 954 (2d Cir. 1980) (Friendly, J., dissenting), *rev'd sub nom. Schweiker v. Hansen*, 450 U.S. 785 (1981)), the Court admonished that where "there are less drastic remedies available for failure to meet a statutory deadline, courts should not assume that Congress intended the agency to lose its power to act." 476 U.S. at 260 (footnote omitted); *see United States v. Montalvo-Murillo*, 495 U.S. 711, 717-18 (1990) ("There is no presumption or general rule that for every duty imposed upon the court or the Government and its prosecutors there must exist some corollary punitive sanction for departures or omissions, even if negligent.") (citation omitted). Finding that a less drastic remedy was available in the form of an action to enforce CETA's 120-day deadline, 476 U.S. at 260 n.7, the Court held that "the mere use of the word 'shall' in [29 U.S.C. § 816(b)], standing alone, [was] not enough to remove the Secretary's power to act after 120 days."[3] *Id.* at 262 (footnote omitted).

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[3] The Court distinguished on two grounds its decision in *Mohasco Corp. v. Silver*, 447 U.S. 807 (1980), wherein it had held that the 300-day time period in the Civil Rights Act of 1964, 42 U.S.C. § 2000e-5(e), was jurisdictional.

First, the Court emphasized the fact that, whereas § 2000e-5(e) provided a time frame within which a Civil Rights Act plaintiff

On the other hand, the Court declined in *Pierce County* to embrace the Secretary's antipodal argument, urged here by the government, that a statutory deadline for agency action can never bar later action unless Congress has explicitly specified such a consequence in the statute itself. *Id.* at n.9. The Court did recognize the established line of Court of Appeals precedent that adopted such a position, *see, e.g., St. Regis Mohawk Tribe, New York v. Brock*, 769 F.2d 37, 41 (2d Cir. 1985), *cert. denied*, 476 U.S. 1140 (1986) and acknowledged that its own decisions articulating the general principle that official negligence should not be allowed to prejudice the public interest constituted the underpinnings for that precedent. *Id.* at 259-60. However, the Court expressly refused to draw a conclusive

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had only *to file a complaint*, CETA's deadline required the Secretary not just to file a complaint, but *to resolve the entire dispute* within 120 days, 29 U.S.C. § 816(b). 476 U.S. at 261. Because this presents a "more substantial task than filing a complaint, and the Secretary's ability to complete it within 120 days is subject to factors beyond his control," the Court reasoned, "there is less reason [ ] to believe that Congress intended such drastic consequences to follow from the Secretary's failure to meet the 120-day deadline." *Id.* Second, the Court noted that *Mohasco* was a private cause of action, so that the plaintiff's failure there to file a timely complaint only prejudiced that plaintiff, whereas a holding in *Pierce County* that the Secretary's failure to issue a timely report barred further agency action would prejudice the rights of the taxpaying public. *Id.*

These two distinctions of *Mohasco* are equally apposite here. First, section 3730(b)(4) does not simply require the government to file a complaint within 60 days, but rather requires the government to investigate the private qui tam relator's allegations and determine whether they present adequate grounds for the government to proceed with the case, and, if adequate grounds exist, to determine whether it is in the government's interest to prosecute the case. As Congress recognized, these tasks could very well take more than 60 days. See 31 U.S.C. § 3730(b)(3). Second, the instant case obviously concerns the public's interest in preventing fraud against the government, and is not, as was *Mohasco*, simply a private cause of action.

inference from Congress' failure to specify a consequence for failing to comply with section 816(b), and instead resorted to other indicia of congressional intent to determine whether Congress meant noncompliance with section 816(b)'s deadline to bar subsequent agency action. *Id.* at 262 n.9, 262-64. Only after finding that CETA's history and purpose provided no evidence of such an intent, did the Court hold that CETA's 120-day deadline was not a jurisdictional requirement. *Id.* at 262-66.

Thus, the only principle, unorthodox as it may be, that emerges from *Pierce County* is that, where a statuory deadline requiring that the government "shall" take certain action within a particular time frame fails to specify the consequences of the govenment's failure to comply with that deadline, courts should not assume from the statute's mandatory language itself that a jurisdictional requirement was intended, if a remedy for the government's noncompliance less drastic than dismissal is available. *Id.* at 262. Rather, in such a context, they should examine the "normal indicia of congressional intent," *id.* at n.9, to determine whether Congress meant the provision to be jurisdictional. *Id.* at 262.

Applying *Pierce County* in the case before us requires a holding that section 3730(b)(4) is not a jurisdictional requirement. As in Pierce County, the only textual evidence that Congress intended section 3730(b)(4) to be jurisdictional is the statutory requirement that the Secretary "shall" elect whether to intervene in a timely fashion. *Compare, e.g.*, 31 U.S.C. § 3730(e)(1)-(e)(4) ("No court shall have jurisdiction over an action . . ."); 28 U.S.C. § 2415(a) (West Supp. 1993) ("every action for money damages brought by the United States . . . which is founded upon any contract . . . *shall be barred* unless the complaint is filed within six years . . .") (emphasis added); 28 U.S.C. § 2415(b) (West Supp. 1993) ("every action for money damages brought by the United States . . . which is founded upon a tort *shall be barred* unless the complaint is filed within three years . . .")

(emphasis added). Also as in *Pierce County*, remedies less drastic than dismissal are available for the government's failure to meet section 3730(b)(4)'s deadline. In *Pierce County*, the less severe remedy was allowing adversely affected complainants to bring an action in district court to enforce CETA's 120-day deadline. *See* 476 U.S. at 260 n.7. Here, to the extent there is any cognizable injury at all resulting from the government's untimely decision to intervene, the less extreme remedies of an order compelling the government to comply with section 3730(b)(4)'s timeliness requirement, or even a ruling that the government's failure to comply with section 3730(b)(4) amounts to an election under section 3730(b)(4)(B) not to take over the action,[4] are available. Given the availability of these remedies, *Pierce County* compels us to hold that the mere use of the word "shall" in section 3730(b)(4) is not enough to render that provision a jurisdictional requirement.

Having found nothing in the statutory text sufficient under *Pierce County* to manifest an intent that section 3730(b)(4) serve as a jurisdictional requirement, we turn, as *Pierce County* instructs us to do, to other indicia of congressional intent.[5] Contrary to BD's assertions as

[4] Construing the government's failure to act timely as an election not to intervene would allow the relator himself to conduct the action, 31 U.S.C. § 3730(b)(4)(B), but is clearly less harsh than barring the government from further action, since the government still could, under section 3730(c)(3), intervene at a later date.

[5] It may be that the Supreme Court's recent decision in *United States v. James Daniel Good Real Property*, 114 S. Ct. 492, 506 (1993), renders unnecessary any resort to legislative history where Congress has not specified the consequence of dismissal for the government's failure to meet a statutory deadline. The Court in *James Daniel Good Real Property* characterized *Pierce County* as "holding that if a statute does not specify a consequence for noncompliance with statutory timing provisions, the federal courts will not in the ordinary course impose their own coercive sanction," and cited *St. Regis Mohawk Tribe*, 769 F.2d at 41, which squarely held that the absence of a specification of consequence

to the statute's history and purpose, we find nothing there to suggest that Congress intended section 3730(b)(4) to be jurisdictional in character. BD directs us in particular to a passage in the Senate Committee's Report to the effect that extensions of the time in which the government must elect whether to intervene, *see* 31 U.S.C. § 3730(b)(3), should only be granted upon a showing of good cause, so as to prevent unnecessary government delay in deciding whether to proceed with the action. *See* S. Rep. No. 345, 99th Cong., 2d Sess. 24-25 (1986). Although it is true, as this passage bears out, that Congress was concerned that section 3730(b)(3) not be a vehicle for unnecessary governmental delay, this passage simply does not address the particular question of what remedy should be afforded where the government does delay. Indeed, if any of the concerns that prompted enactment of section 3730(b)(3) are significant to the question we address here, it is not that the government should be prevented from abusing the extension privilege, but rather that, because the intervention decision may at times require substantial, time-consuming investigation, the government should not be bound in all cases to a 60-day period in deciding whether to intervene in qui tam actions. That Congress had this latter concern suggests, if anything, that it may not have intended section 3730(b)(4) as a jurisdictional requirement. *Cf.*

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in the statutory text is dispositive of congressional intent not to create a jurisdictional requirement. *Id.* Notwithstanding this characterization, the Court later stated that Congress' failure to specify a consequence for noncompliance with the statutory deadline in question merely "implies" that a jurisdictional requirement was not intended, and it proceeded to an analysis of the Act's legislative history. 114 S. Ct. at 50607. Because the Court did not expressly reject in *James Daniel Good Real Property* the legislative history prong of its analysis in *Pierce County*, and indeed undertook an examination of legislative history, we believe we are obliged to adhere strictly to that somewhat unorthodox analysis. Of course here, because we find no legislative history to support a conclusion that Congress intended section 3730(b)(4) as a jurisdictional provision, it is not imperative that we decide whether the Court in fact has abandoned the second prong of its *Pierce County* analysis.

Pierce County, *supra*, at 261 (fact that determination as to alleged misuse of funds claim is "more substantial task than filing a complaint" suggests that Congress did not intend dismissal for failure to timely make determination); *see also supra* note 3.

BD's efforts to distinguish *Pierce County* are unpersuasive. BD contends primarily that the rule against construing statutory deadlines as jurisdictional requirements is controlling only where, as in *Pierce County*, the deadline is applicable to the government acting in an administrative capacity, and that it has no application where, as here, the deadline is imposed upon the government as a party to litigation. Neither principle nor precedent, however, support a distinction of *Pierce County* on this ground. As a matter of principle, BD has failed to articulate and we fail to see why the broadly stated policy of prohibiting an official's negligence from prejudicing the public interest would apply with any less force where the government acts in a litigating capacity than where it acts in an administrative capacity.

Moreover, the cases relied upon in *Pierce County* confirm that the Pierce County reasoning and holding are equally applicable to the government as litigant. The cases from which the Court derived the "great principle of public policy" protecting the public interest from official negligence, *see* 476 U.S. at 260, invoked that principle to justify holdings that laches and statutes of limitations—the archetypical deadlines governing litigants—ordinarily will not run against the government ("*quod nullum tempus occurrit regi*"). *See Guaranty Trust Co. of New York v. United States*, 304 U.S. 126, 132-33 (1938) (rule that statutes of limitations will not run against the government derives its "continuing vitality" from underlying public policy of preserving public rights from negligence of public officers); *Stanley v. Schwalby*, 147 U.S. 508, 514-15 (1893); *Nashville, C. & St. L. Ry. Co.*, 118 U.S. at 125; *see also Block v. North Dakota*, 461 U.S. 273, 294 (1983) (O'Connor, J., dissenting)

(reciting history of and rationale for principle "*nullum tempus occurrit regi*"). Indeed *Marshall v. Local Union 1374, Int'l Ass'n of Machinists and Aerospace Workers, AFL-CIO*, 558 F.2d 1354 (9th Cir. 1977), also cited by the Court in *Pierce County*, 476 U.S. at 259 n.6, as a case whose underpinnings were found in the "great principle of public policy" therein discussed, *id.* at 260, is almost directly on point with the instant case. In *Local Union 1374*, the Ninth Circuit held that the Secretary of Labor's failure to comply with the requirement that he "shall" bring suit within 60 days of receiving a complaint, 29 U.S.C. § 482(b), a directive even more akin to a jurisdictional requirement than section 3730(b)(4)'s injunction that the government "shall" elect whether or not to intervene within 60 days, does not bar a later suit. Thus, the very cases from which the *Pierce County* Court derived the general principle of protecting the public interest from the consequences of official negligence, as well as authority cited by the Court as based on that principle, address themselves to the government in its litigating capacity.

Nor can we accept BD's contention that the entire *Pierce County* line of precedent is inapposite because its underlying concern for protecting the public interest is inapplicable where, as here, a private litigant would still be positioned to represent the public's interest after the government was dismissed. Even assuming that the relator will be able to proceed with an action where the government has been dismissed, which is not necessarily the case here and often may not be, this argument rests on the flawed assumption that private relators are equally effective in prosecuting false claims on the government as is the government itself. Although the FCA encourages *qui tam* relators to bring to the government's attention instances of false claims, 31 U.S.C. §§ 3730(b)(1)-(b)(2), Congress has, not surprisingly, evidenced its contrary judgment that the public is best served by placing with the government the "primary responsibility for *pros-*

ecuting [false claims] action[s]." 31 U.S.C. § 3730(c)(1) (emphasis added); *see generally* 31 U.S.C. § 3730(c). We therefore have little doubt that, at least in Congress' estimation, reading section 3730(b)(4) as a jurisdictional bar on the government would prejudice the public interest, and accordingly reject BD's argument that the *Pierce County* rationale is inapplicable in circumstances such as these.[6] Although one can reasonably doubt the wisdom of a rule shielding public officials from the consequences of their negligence, the Supreme Court has long adhered to such a rule, and we believe it is as applicable here as in other contexts.

Concluding, on the authority of *Pierce County*, that use of the word "shall" is insufficient evidence of a congressional intention that section 3730(b)(4) serve as a jurisdictional requirement upon the government in *qui tam* actions, and finding nothing in the FCA's history or purpose suggesting that Congress did intend a jurisdictional requirement, we are constrained to hold that the government's failure to comply with section 3730(b)(4) does not bar its further prosecution of a *qui tam* action.[7]

[6] The public interest here entrusted primarily to the government's protection is a particularly substantial one. Unlike in various other contexts where governmental action on behalf of an individual's interest has been held not to be barred by an official's tardiness, *e.g.*, *Marshall v. N.L. Industries, Inc.*, 618 F.2d 1220, 1224 (7th Cir. 1980) (Secretary of Labor bringing action on behalf of employee alleging unlawful termination); *Local Union 1374*, 558 F.2d 1354 (Secretary of Labor bringing action on behalf of individual alleging union election fraud), here the government is prosecuting directly to protect the public fisc itself against the massive drain, *see United States ex rel. Doe v. John Doe Corp.*, 960 F.2d 318, 319 (2d Cir. 1992) ("The Department of Justice has estimated fraud as draining 1 to 10 percent of the entire Federal budget.") (quoting S. Rep. No. 345, 99th Cong., 2d Sess. 3 (1986)), of fraudulent claims. *See Pierce County*, 469 U.S. at 262 (protection of public fisc is matter of interest to every citizen).

[7] In holding that section 3730(b)(4) is not jurisdictional, we do not intend to draw into question the district court's discretion to decline to grant to the government time extensions under section

Because we hold that section 3730(b)(4) is not a jurisdictional requirement, we reverse that portion of the district court's order dismissing the government as a party plaintiff and dismissing the government's complaint.

III.

We next address Siller's contention that the district court erred in holding that his action was "based upon" publicly disclosed allegations, and thus barred under section 3730(e)(4).

By 1986, when section 3730(e)(4) was enacted, Congress had come to the conclusion that "fraud against the Government was apparently so rampant and difficult to identify that the Government could use all the help it could get from private citizens with knowledge of fraud." *United States ex rel. LaValley v. First Nat'l Bank of Boston*, 707 F. Supp. 1351, 1355 (D. Mass. 1988) (summarizing sentiments motivating 1986 amendments to FCA); *see* S. Rep. No. 345, 99th Cong. 2d Sess. 2-4 (1986), and consequently amended the the FCA, to *inter alia*, "encourage more private enforcement suits." *Id.* at 2324. At the same time, however, Congress sought to prevent "parasitic" qui tam actions in which relators, rather than bringing to light independently-discovered information of fraud, simply feed off of previous disclosures of government fraud. *See, e.g., United States ex rel. Stinson v. Prudential Ins. Co.*, 944 F.2d 1149, 1154 (3d Cir. 1991) (collecting sources). Congress sought to strike this balance largely through the enactment of section 3730(e)(4), which provides in relevant part that—

> (A) No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or

3730(b)(3). Nor do we address the separate question of whether the district court may, in its discretion, deny the government the right to proceed with the action because of repeated noncompliance with orders of the court.

> administrative hearing . . . unless . . . the person bringing the action is an original source of the information.
>
> (B) For purposes of this paragraph, "original source" means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under this section which is based on the information.

31 U.S.C. 3730(e)(4).

Under the terms of section 3730(e)(4), Siller's action was properly dismissed only if (1) it was "based upon" the allegations against BD in the SSI suit; (2) the SSI suit's disclosure of these allegations constituted a "public disclosure" in a "civil . . . hearing"; and (3) Siller was not an "original source," either because he did not have "direct and independent knowledge of the information on which the allegations were based" or had not "voluntarily provided the information to the Government" before he brought his suit. We address these issues, each of which raises unsettled questions of statutory construction, seriatim.

A.

The district court held that Siller's action was barred under section 3730(e)(4)(A) because it was "based upon" the disclosures in the complaint filed in SSI's action against BD. Siller contends that a *qui tam* action is only "based upon" a public disclosure where the relator has actually derived from that disclosure the knowledge of the facts underlying his action. Under this reading of section 3730(e)(4)(A), Siller argues, his complaint, even if substantially simliar to that in the SSI litigation, was not "based upon" the disclosures in the SSI complaint because he actually learned of BD's overcharging practices independently of the SSI complaint. BD re-

sponds that any *qui tam* complaint, such as Siller's, that "echoes" previously disclosed allegations is "based upon" those disclosures, regardless of whether those disclosures are actually the source from which the *qui tam* plaintiff derived his information.

We agree that Siller's reading of "based upon" as meaning "derived from" is the only fair construction of the statutory phrase. Section 3730(e)(4)(A)'s use of the phrase "based upon" is, we believe, susceptible of a straightforward textual exegesis. To "base upon" means to "use as a basis for." *Webster's Third New International Dictionary* 180 (1986) (definition no. 2 of verb "base"). Rather plainly, therefore, a relator's action is "based upon" a public disclosure of allegations only where the relator has actually derived from that disclosure the allegations upon which his *qui tam* action is based. Such an understanding of the term "based upon," apart from giving effect to the language chosen by Congress, is fully consistent with section 3730(e)(4)'s indisputed objective of preventing "parasitic" actions, *see, e.g., Stinson, supra*, at 1154, for it is self-evident that a suit that includes allegations that happen to be similar (even identical) to those already publicly disclosed, but were not actually derived from those public disclosures, simply is not, in any sense, parasitic.

We are aware, as BD points out, that other circuits have not embraced this interpretation of the phrase, assuming instead that an action is based upon a public disclosure of allegations if its allegations are identical or similar to those already publicly disclosed. However, only one court of appeals has actually held that a relator need not have derived his knowledge from a public disclosure in order for his action to have been based upon that disclosure, and that court summoned neither reasoning nor supportive case authority in defense of its holding. In *John Doe Corp.*, the Second Circuit held that a *qui tam* plaintiff's action is "based upon" a public disclosure where

the relator's allegations are "the same as those that ha[ve] been publicly disclosed . . . . regardless of where the relator obtained his information." 960 F.2d at 324. The court in *John Doe*, however, without a single word of analysis, merely cited two cases in support of its holding, *United States ex rel. Dick v. Long Island Lighting Co.*, 912 F.2d 13, 18 (2d Cir. 1990), and *LaValley*, 707 F. Supp. at 1367, and neither provides authority for the *John Doe* holding.[8]

In *Long Island Lighting*, the court held that "if the information on which a *qui tam* suit is based is in the public domain, and the *qui tam* plaintiff was not a source of that information, then the suit is barred." 912 F.2d at 18. Taken out of context, as it was in *John Doe*, this quotation might appear to represent a holding that a *qui tam* action is "based upon" a public disclosure whenever the allegations are identical or similar to allegations already publicly disclosed. However, the *Long Island Lighting* court itself never addressed the particular question of when a *qui tam* action is "based upon" a public disclosure. There was in that case "no dispute that [the *qui tam* plaintiffs'] suit [was] based upon publicly disclosed 'allegations or transactions'": the only issue before the court was whether the relators were "original sources" under section 3730(e)(4). 912 F.2d at 16.

LaValley, the other case upon which the *John Doe* court relied, also does not support *John Doe's* holding. There, the district court interpreted "based upon" virtu-

[8] Although we reject the *John Doe* construction of the statutory text, we understand why the court was drawn toward its holding that the particular *qui tam* action at issue in that case was "based upon" a previous disclosure and therefore barred. There, the *qui tam* plaintiff was an attorney who only learned of the pertinent fraud allegations through his representation of a client whose employer was being investigated for suspected fraudulent billing practices in its transactions with the Government. However, under our reading of section 3730(e)(4), which we believe is more faithful to the enacted language, the same result might well obtain.

ally identically to the way we interpret the phrase, holding that, although the factual basis underlying the *qui tam* action in that case was disclosed in a bankruptcy trustee's complaint, the action was not barred because "the information and knowledge upon which [the *qui tam*] action [was] based *did not originate from* the [b]ankruptcy [t]rustee's [c]omplaint." 707 F. Supp. at 1367 (emphasis added). In a statement relied upon by the Second Circuit, the district court went on to note that the information related by the key witness in the case, on which the action was based, could not bar the *qui tam* plaintiffs' suit, because that information was never "contained in a public disclosure." *Id.* The court in *John Doe* simply misunderstood this latter observation as meaning that the action was not based upon the witness' information because that information was never publicly disclosed, when in fact it meant only precisely what it said—that the information related by the key witness, on which the action was based, could not serve as a bar to the action because it was never publicly disclosed.

We recognize that other courts of appeals seem implicitly to have accepted the position, contrary to ours, that *qui tam* actions are "based upon" a public disclosure whenever the factual basis for the action has been disclosed into the public domain, regardless of whether the relator actually derived his knowledge of those facts from that disclosure. See *United States ex rel. Springfield Terminal Ry. Co. et al. v. Quinn*, 14 F.3d 645, 652-55 (D.C. Cir. 1994) (Congress sought to prohibit *qui tam* actions when allegation of fraud or critical elements of fraudulent transaction "were in public domain."); *United States ex rel. Kreindler & Kreindler v. United Technologies Corp.*, 985 F.2d 1148, 1158 (2d Cir.) (quoting *John Doe* with approval), *cert. denied*, 113 S. Ct. 2962 (1993); *United States ex rel. Precision Co. v. Koch Industries Inc.*, 971 F.2d 548, 552 (10th Cir. 1992) (" 'based upon' is properly understood to mean 'supported by' "), *cert. denied*, 113 S. Ct. 1364 (1993). None of

these cases, however, actually addresses the specific question whether a *qui tam* relator need have derived his knowledge of the factual basis of his action from a public disclosure in order for his action to be "based upon" that disclosure. Rather, each of these cases addresses the question whether a *qui tam* action that is only based in part on publicly disclosed information should be deemed to be "based upon" the public disclosure under section 3730 (c)(4)(A). The extent to which a *qui tam* action must be "based upon" a public disclosure is, of course, distinct from the analytically antecedent question of what it means for an action to be "based upon" a public disclosure. Moreover, none of these cases provides any reasoning by which to reconcile its implicit understanding of the phrase "based upon" with the phrase's plain meaning. The *Precision* decision, for example, baldly asserts that "[a]s a matter of common usage, the phrase 'based upon' is properly understood to mean 'supported by.'" 971 F.2d at 552. We are unfamiliar with *any* usage, let alone a common one or a dictionary definition, that suggests that "based upon" can mean "supported by." Preferring the plain meaning of the words enacted by Congress over our sister Circuits' as-yet unconsidered assumptions as to the meaning of those words, and over the Second Circuit's considered but unsupported interpretation, we hold that Siller's action was only "based upon" the disclosures in the SSI lawsuit if Siller actually derived his allegations against BD from the SSI complaint.

It is not clear to us that the district court found that Siller actually derived the allegations in his *qui tam* action from the SSI complaint. The district court found that the SSI suit publicly disclosed allegations that "derived from exactly the same core of operative facts . . . that form[ ] the basis for" Siller's *qui tam* complaint. J.A. at 14. That the facts that were disclosed in the SSI complaint and the facts that "formed the basis for"

Siller's action were the same does not, however, mean that Siller actually derived his allegations from the allegations in the SSI complaint. It is certainly possible that, as Siller contends, Siller actually learned of BD's alleged fraud entirely independently of the SSI suit, and derived his allegations from that independent knowledge. Therefore, because the district court made no finding on whether Siller actually derived his allegations from the SSI suit, a finding necessary to the conclusion that Siller's action was "based upon" that suit, we also vacate the portion of the district court's order dismissing Siller's action so as to enable the court to address this factual question on remand.

In doing so, however, we do not upset the district court's express finding that the same essential facts underlay both the SSI suit and Siller's *qui tam* action. *Id.* We are not persuaded by Siller's argument that the SSI complaint failed to allege a fact (*i.e.*, BD's failure to disclose its overcharges) critical to his present action. Contrary to Siller's assertion, it appears to us that the allegation in SSI's complaint that BD charged the government more than its other customers, in violation of its contractual (and statutory, *see* 41 U.S.C. § 253e(b)) obligation, *see* J.A. at 95,[9] is essentially the same allegation that Siller has made against BD.

B.

The district court also held that the disclosure of allegations in SSI's complaint that BD charged the Govern-

[9] The SSI complaint states in its most relevant part that:

> the prices quoted by [BD] to the United States Government were not the best prices quoted to other customers and therefore violated the "Most Favored Customer" provision of its contract with the United States Government pursuant to GSA's 1982 Policy Statement on Multiple Award Schedule Programs and Title XII of the Defense Procurement Act of 1984.

J.A. at 95.

ment more than its other customers constituted a "public disclosure of allegations" in a civil "hearing." The district court's interpretation is supported by the holding of every court of appeals to have addressed the question, that any information disclosed through civil litigation and on file with the clerk's office should be considered a public disclosure of allegations in a civil hearing for purposes of section 3730(e)(4)(A). *See Quinn*, 14 F.3d at 651; *Kreindler*, 985 F.2d at 1158; *Precision*, 971 F.2d at 554 n.5; *Stinson*, 944 F.2d at 1154-56. Siller argues that, even if his action is deemed to be "based upon" the allegations in the SSI complaint, the action is not barred because the term "hearing" does not encompass the mere filing of a complaint. While we believe this presents a closer question of statutory construction, we affirm the district court's interpretation of this part of section 3730 (e)(4)(A).[10]

A civil complaint is unquestionably a "public disclosure of allegations." The difficult issue is whether a disclosure in a complaint constitutes a disclosure in a "civil hearing." Because a disclosure in a complaint is a disclosure in a civil proceeding, the ultimate resolution of this issue turns on whether the term "hearing" can be understood as including a "civil proceeding." We concede, as Siller argues, that a "hearing" is ordinarily understood as an event that occurs within a civil proceeding, rather than as an entire civil proceeding itself. We do not believe, however, that the definition of the term "hearing" is so fixed that it cannot possibly refer to (or at least include) an entire civil proceeding. *See United States v. Florida East Coast Ry. Co.*, 410 U.S. 224, 239 (1973) (term "'hearing' in its legal context undoubtedly has a host

[10] Siller also urges that we read the term "civil hearing" as only encompassing hearings in civil cases to which the Government is a party. We reject this invitation. Neither the language of the provision nor any precedent interpreting that language even arguably supports such a construction of the provision.

of meanings" that will vary depending on the context); *see also Black's Law Dictionary* 721 (hearing "frequently used . . . to describe whatever takes place before magistrates clothed with judicial functions and sitting without jury *at any stage of the proceedings subsequent to its inception*") (emphasis added) (1990). We are also unpersuaded by Siller's contention that, as a practical matter, Congress might have meant to include live hearings but exclude civil complaints and other court filings because disclosures in a public hearing between private parties are more likely to come to the government's attention than are disclosures in filings, and we can imagine no other reason why Congress would have intended a meaning of "hearing" that excluded civil proceedings. Given the fluidity in the meaning of the term "hearing," and the fact that we can discern no reason why Congress might have intended otherwise, we agree with our sister Circuits (albeit somewhat reluctantly) that an entire civil proceeding can constitute a "hearing" for purposes of section 3730(e)(4)(A).[11] *See Quinn, supra*, at 651 (" 'hearing' is roughly synonymous with 'proceeding.' "); *cf. Anchorage Assoc. v. Virgin Islands. Bd. of Tax Review*, 922 F.2d 168, 176 (3d Cir. 1990) ("hearing" under Rule 56(d) does not require oral hearing or live, formal judgment). We therefore do not disturb the district court's holding that the allegations in the SSI complaint were, for purposes of section 3730(e)(4)(A), publicly disclosed in a civil "hearing."

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[11] Given our conclusion that the term "hearing" can include civil proceedings, we are untroubled by the fact that Congress originally used the term "proceeding" in a previous version of what ultimately became section 3730(e)(4) before substituting the term "hearing" for the term "proceeding." *See* S. 1562, 99th Congress, 1st Sess., § 2 at 3 (1985).

C.

In addition to its holding that Siller's action was based upon previously disclosed public allegations in a civil hearing within the meaning of section 3730(e)(4)(A), the district court also held that Siller was not an "original source" within section 3730(e)(4)'s exception to its jurisdictional bar. In so holding, the court expressly adopted the standard fashioned by the Second Circuit in *Long Island Lighting Co.*, 912 F.2d at 16; *accord Wang v. FMC Corp.*, 975 F.2d 1412, 1418 (9th Cir. 1992). That standard requires that, in order to be considered an "original source," a *qui tam* plaintiff must not only have direct and independent knowledge of the information on which his allegations are based, and have provided that information to the government, but also must have "been a source to the entity that publicly disclosed the allegations on which a suit is based." *Long Island Lighting*, 912 F.2d at 16 (emphasis added). Finding that Siller was not a source to SSI, the "entity that publicly disclosed the allegations" on which Siller's suit was found to be based, *id.*, the district court held that Siller was not an "original source" under section 3730(e)(4).

We reject the Second Circuit's standard, and the district court's adoption of that standard, as imposing an additional, extra-textual requirement that was not intended by Congress. Reading subparagraph (B), as we are directed by the statute, as the definition of "original source" applicable to sub-paragraph (A), sub-paragraph (A) is properly read as providing that,

> no court shall have jurisdiction over an action . . . based upon the public disclosure of allegations . . . in a . . . civil . . . hearing . . . *unless . . . the person bringing the action . . has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an*

> *action* under this section which is based on the information.

31 U.S.C. § 3730(e)(4) (emphasis added). Under this reading of section 3730(e)(4), the provision unambiguously does not require, as the Second Circuit has held that it does, that a relator be a source to the original disclosing entity in order to be an "original source." Rather it requires only that the relator have direct and independent knowledge of the information underlying the allegations of a false claim and voluntarily provide the information to the government before filing his *qui tam* action.

The Second Circuit's attempt to portray its holding that a relator must also be a source to the disclosing entity as one derived from the provision's text is not merely unpersuasive, but implausible. The Second Circuit essentially holds that sub-paragraphs (A) and (B) each provides distinct and cumulative requirements for being an "original source." Thus, it reasons, sub-paragraph (A) requires that the relator be an original source to the entity that made the public disclosure, and sub-paragraph (B) additionally requires that the relator have direct and independent knowledge of the allegations underlying his *qui tam* action and that he provide his information to the government. *Long Island Lighting*, 912 F.2d at 16-17; *see also id.* at 17 ("¶ (4)(B) does not contain the exclusive requirements in order for one to be an 'original source' and that an additional requirement is to be found in ¶ (4)(A)."),

The Second Circuit's interpretation of section 3730(e)(4) to require that the putative plaintiff provide his information to the disclosing entity might at least be tenable were there not a definition of "original source" in sub-paragraph (B). But the term "original source" as it is used in sub-paragraph (A) is expressly defined in sub-paragraph (B). Sub-paragraph (B) necessarily, therefore, sets forth that which the Second Circuit holds it

does not—"the exclusive requirements that a *qui tam* plaintiff must satisfy to be an 'original source.'" *Id.* at 17.

The Second Circuit's "close textual analysis," *id.* at 16, that yields this interpretation is wholly indefensible. The essence of the Second Circuit's textual reasoning is that the word "information" in subparagraph (A) refers to the information publicly disclosed, whereas the "information" in sub-paragraph (B) refers to the information that supplies the basis for the *qui tam* action itself. This "slight difference in meaning" between these two uses of the word "information," suggests the Second Circuit, "permits the interpretation that ¶ (4)(B) does not contain the exclusive requirements in order for one to be an 'original source' and that an additional requirement is to be found in ¶ (4)(A)." *Id.* Besides the fact that a "slight difference" between the meaning of "information" in the two paragraphs cannot justify a holding that sub-paragraph (B)'s definition of "original source" is not the entire definition of that term, the reasoning that underlies the Second Circuit's conclusion that the word "information" means something different in the two provisions is demonstrably incorrect.

First, it states, "if the word 'information' means the same in ¶ (4)(A) as it does in ¶ (4)(B), then its use in ¶ (4)(A) would be superfluous." *Id.* Because the definition of "original source" in subparagraph (B) references the information on which the allegations are based, inclusion of the prepositional phrase "of the information" in sub-paragraph (A) is, in the most hypertechnical sense, unnecessary. However, the phrase is not superfluous in a way or to a degree that warrants ascribing different meanings to the same word used in two successive clauses. In other words, it is so unlikely that Congress would have even noticed the technical redundancy, that no significance can reasonably be inferred from inclusion of the prepositional phrase in sub-paragraph (A).

Second, the *Long Island Lighting* court suggests that, because the word "information" in sub-paragraph (B) is accompanied by a modifying phrase while the word "information" is without modification in sub-paragraph (A), "information" must mean something different in sub-paragraph (B) than it does in sub-paragraph (A). *Id.* at 16-17. Although it is true that "information" is modified in sub-paragraph (B) and is not in sub-paragraph (A), the modifying phrase used in sub-paragraph (B)—"on which the allegations are based"—itself confirms that the word "information" in sub-paragraph (B) has the identical meaning that the Second Circuit agrees the word has in subparagraph (A). "The allegations" referred to in the modifying phrase can only mean those allegations publicly disclosed, since those not only are the allegations referenced in the clause preceding the modifying phrase, but are the only allegations mentioned at all in section 3730(e)(4). Thus, "the information on which the allegations are based" in sub-paragraph (B) cannot possibly refer to anything but the information on which the *publicly disclosed* allegations are based, which is, as the Second Circuit agrees, *id.* at 17, the precise information referenced in sub-paragraph (A).

Finally, the Second Circuit posits, without explanation, that "the most plausible reading of ¶ (4)(B) indicates that the 'information' referred to therein is that which supplies the basis for the *qui tam* action itself." *Id.* As set forth above, however, the fact that subparagraph (B) refers to "the information on which the allegations are based" confirms that the only possible reference of the word "information" in sub-paragraph (B) is to the information publicly disclosed—the exact same reference of the word in sub-paragraph (A).

We believe that, in truth, the Second Circuit's conclusion that a putative plaintiff must provide his information to the disclosing entity in order to be an original source rests not upon the statutory language, but entirely upon

a reading, and misreading, of the legislative history. In fact, the Second Circuit's decision is a classic example of the use of legislative history to create an ambiguity in the statute where none exists in order to justify use of that history as dispositive evidence of congressional intent.

The Second Circuit fixes on Senator Grassley's comment that "the jurisdictional requirements of § 3730 (e)(4) bar[] a person 'who had not been an original source *to the entity that disclosed the allegations*' from bringing a *qui tam* claim based on publicly disclosed information." *Id.* (quoting 132 Cong. Rec. 20,536 (1986)) (emphasis added). If the provision to which this comment was directed had been enacted as it existed at the time Senator Grassley made the comment, the comment would be some evidence of a congressional intent supporting the Second Circuit's interpretation, although even then we would not permit such a statement to override statutory language as clear as that in subparagraph (B). In fact, however, the version of the legislation addressed by Senator Grassley[12] was changed in two significant respects.

First, Congress deleted "the media" as a party whom the original source was required to inform. Given that the media is specified in the enacted version of subparagraph (A) as one of the disclosing entities, Congress presumably would not have deleted the media from the "original source" definition in sub-paragraph (B) if it intended to require the plaintiff to provide his information to the disclosing entity. Second, Congress ultimately provided that an original source had to inform the govern-

[12] The language upon which Senator Grassley commented defined an "original source" as

> an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily informed the Government or the news media prior to an action filed by the Government.

132 Cong. Rec. S11,240 (daily ed., Aug. 11, 1986).

ment only "before filing [his *qui tam*] action," 31 U.S.C. § 3730(e)(4)(B), as opposed to "prior to an action filed by the Government." 132 Cong. Rec. S11,240 (daily ed. Aug. 11, 1986). It would be odd, if Congress had intended a plaintiff to be a source to the disclosing entity in order to be an "original source," for it to have allowed the plaintiff to provide his information after the public disclosure (i.e., by only requiring the provision of information before the plaintiff brings his action).[13] These two changes suggest that, even assuming that Congress may at one point have intended a plaintiff to be a source to the disclosing entity to be an original source, which is anything but clear, it ultimately chose not to enact such a requirement into law.[14]

[13] The Second Circuit also relies upon Representative Berman's observation that "a person is an original source if he had some of the information related to the claim which he made available to the government or the news media in advance of the false claims being publicly disclosed," 132 Cong. Rec. H9,389 (October 7, 1986), 912 F.2d at 17. This statement was directed to the same version of the legislation as was Senator Grassley's, although the date on which this statement was made might suggest otherwise. *See Stinson*, 944 F.2d at 1167 (Scirica, J., dissenting). Compare 132 Cong. Rec. S11,240 (August 11 version of amendments, requiring original source to provide information "to the Government or the news media prior to an action filed by the Government") with 31 U.S.C. § 3730(e)(4)(B).

[14] Of course, even if one chose to ignore the amendments made to the version of the legislation upon which Senator Grassley commented, and attribute dispositive significance to the Senator's comments over the plain language of the statute, there still would be no basis for holding that a plaintiff must provide his information to a non-government, non-media disclosing entity in order to be an original source. It is evident that even Senator Grassley, at the time he made his comment, understood that only the government or the media would be disclosing entities. *See* 132 Cong. Rec. S11,241 (Aug. 11, 1986) (daily ed., comment by Senator Grassley). In other words, it appears that Congress may never even have considered the possibility that the disclosing entity would be, as it is here, a nongovernment, non-media entity.

The temptation might be, in the name of symmetry between subparagraphs (A) and (B), to interpret subparagraph (B) to re-

That the Second Circuit's textual analysis is less than persuasive was recognized by the Ninth Circuit in *Wang*, 975 F.2d at 1418, the only Court of Appeals to have adopted the Second Circuit's "original source" requirement. That court, instead of relying upon the Second Circuit's statutory analysis, rested its decision to impose the third original source requirement wholly on the statute's legislative history, albeit a different portion of the history from that discussed in *Long Island Lighting*. *See Wang*, 975 F.2d at 1418-19. This portion of the history of the FCA, we believe, supports, but at the very least is consistent with, the unambiguous statutory language that a plaintiff must provide his information only to the government, not to a third-party disclosing entity.

The Ninth Circuit premised its holding almost entirely on the fact that one of the principal objectives of the 1986 amendments was to ensure that, contrary to the holding of decisions such as *United States ex rel. State of Wisconsin v. Dean*, 729 F.2d 1100, 1104 (7th Cir. 1984), a plaintiff who had himself provided the government with the information of fraud prior to bringing his action would not be barred because the government (as a result of the plaintiff's effort) possessed the information on which the action was based. 975 F.2d at 1419 (citing S. Rep. 345, 99th Cong., 2d Sess. 4 (1986)). That Congress sought to "correct" Dean provides no support whatsoever for the conclusion, *see* 975 F.2d at 1419, that Congress intended to require a putative plaintiff to have provided his information to the "disclosing entity" in order to be an "original source."

The jurisdictional provision in effect at the time *Dean* was decided did not even purport to bar *qui tam* suits

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quire the provision of information to all disclosing entities identified in sub-paragraph (A). The obvious problem with such a course, however, is that the deletion of "the media" from sub-paragraph (B), if nothing else, is powerful evidence that Congress did not intend a symmetry between the two paragraphs.

based upon prior public disclosures; it barred only suits "based upon evidence or information *in the possession of the United States* . . . at the time such suit was brought." 31 U.S.C. § 232(C) (1982) (superseded) (emphasis added). The Seventh Circuit in *Dean* simply held that section 232(C) barred the *qui tam* suit in that case because the information was "in the possession of" the government, having been provided to it by the plaintiff. To "correct" *Dean* only required that Congress adopt language that would ensure that a plaintiff who had provided his information to the government would not be barred from bringing a *qui tam* action on the ground that the government already possessed the information. This it did in section 3730(e)(4)(B), by providing that a plaintiff who produces his independently-obtained information to the government is excepted from section 3730(e)(4)(A)'s jurisdictional bar. The Ninth Circuit's error is in its unexplained assumption that, to remedy *Dean*, Congress had to require a plaintiff to provide information to the disclosing entity, as opposed merely to the government. 975 F.2d at 1419.[15]

We are not unmindful that, in contrast to the Second and Ninth Circuits, which have largely relied on the legislative history to the 1986 amendments, some courts, out

[15] Of course, even if one extrapolates from Congress' known intention to avoid *Dean*'s holding an intention to permit plaintiffs who had provided their information to a disclosing entity to bring a *qui tam* action, such an inference would not support a conclusion that Congress intended to require plaintiffs to provide their information to the disclosing entity in order to be an "original source." *Compare supra*, n.14. Indeed, there is evidence that Congress believed that such a requirement was not necessary. The earliest versions of the 1986 amendments did not require that plaintiffs be a source to the government at all, but rather allowed all plaintiffs to bring a suit based on publicly disclosed information, provided that six months had passed since the disclosure without the government having filed an action. *See* S. 1562, 99th Cong., 1st Sess. § 2, at 4 (1985) (Bill introduced on August 1, 1985); Senate Report, *supra*, at 42 (Bill reported out of Senate Judiciary Committee on July 28, 1986).

of utter frustration with the many seeming inconsistencies in the history, have sought to interpret section 3730(e)(4) instead based principally upon the overarching objectives of the legislation. For example, the Third Circuit, after noting that one can find in the legislative history of the FCA amendments "some support somewhere for almost any construction" of the statutory terms, stated that it would "look instead to what [it] [could] glean from the principal intent" of the legislation, which was "to have the *qui tam* suit provision operate somewhere between the almost unrestrained permissiveness" represented by those pre-1943 cases that had allowed plaintiffs to bring *qui tam* actions based upon allegations they had learned about by reading publicly-available criminal indictments, and those post-1943 cases that had barred even suits by plaintiffs who had initially disclosed the fraud to the government. *See*, e.g., *Stinson*, 944 F.2d at 1154. It strikes us as especially inappropriate (not to mention frighteningly treacherous) to attempt, as these courts have done, to distill from such broad, generalized objectives, the answers to the kind of specific statutory questions that we herein address; fine calibrations are just not possible through the use of such crude instruments. This is particularly so in this context, given that, although we can perhaps divine from these abstract purposes a congressional intention to balance the need to encourage *qui tam* actions against the need to prevent parasitic suits, we can discern virtually nothing as to precisely how Congress ultimately believed it achieved that balance. If the language of law is to have any meaning at all, then surely it must prevail over the kind of speculation that is entailed in such an enterprise as these courts have undertaken.

Accordingly, we hold that a *qui tam* plaintiff need not be a source to the entity that publicly disclosed the allegations on which the *qui tam* action is based in order to be an original source under section 3730(e)(4)(B).[16]

[16] Although no other Circuit has expressly rejected the *Long Island Lighting* reasoning, and two have expressly reserved consid-

In addition to having direct and independent knowledge of the information on which the allegations in the public disclosure is based, he need only provide his information to the government before instituting his *qui tam* action, as the provision unambiguously states.

IV.

For the reasons discussed, we reverse that portion of the district court's order dismissing the government as a party-plaintiff and dismissing the government's complaint, and vacate that portion of its order dismissing Siller's complaint as "based upon" the allegations in the lawsuit by SSI against BD. The case is remanded for further proceedings consistent with this opinion.

REVERSED IN PART, VACATED IN PART, AND REMANDED

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eration of its third "original source" requirement, *see Quinn*, 14 F.3d at 657 n.12; *Precision*, 971 F.2d at 553 n.4 (10th Cir.), four Circuits have held that the requirements of an original source are that he have direct and independent knowledge of the information, and have voluntarily provided the information to the government before bringing his suit. *See Quinn, supra*, at 655-57; *Precision, supra*, at 553; *Stinson*, 944 F.2d at 1160-61 (3d Cir.); *Houck on Behalf of the United States v. Folding Carton Admin. Comm.*, 881 F.2d 494, 504-505 (7th Cir. 1989).

APPENDIX B

UNITED STATES DISTRICT COURT
D. MARYLAND

Civ. No. S 91-33

UNITED STATES OF AMERICA,
ex rel. DAVID R. SILLER

v.

BECTON DICKINSON & CO.

Feb. 10, 1993

MEMORANDUM OPINION

SMALKIN, District Judge.

This *qui tam* action under the False Claims Act, 31 U.S.C. § 3730, *et seq.* (FCA), is before the Court on the defendant's motion to dismiss. Because the record is adequately developed to enable the Court to adjudicate the motion without an evidentiary hearing or oral argument on the law, no hearing will be held. Local Rule 105.6, D.Md.

The first issue the Court will address is whether it has jurisdiction over the Government's amended complaint of intervention under the timely filing requirements for such intervention found in 31 U.S.C. § 3730(b)(4). Procedural requirements of the FCA have been held to be mandatory. *See, e.g., Erickson ex rel. United States v.*

American Institute of Biological Sciences, 716 F.Supp. 908 (E.D.Va.1989).

The relevant statute allows the Government to seek unlimited extensions of the 60-day time period within which it must act under section 3730(b)(4). 31 U.S.C. § 3730(b)(3). In this case, a number of such extensions were sought and granted. The principal problem is with one of the extensions which was sought by a *nunc pro tunc* motion filed with the Court on March 26, 1992, and granted by Judge Legg on March 27, 1992. The previous extension had expired on March 4, 1992, and unless the *nunc pro tunc* order was effective to extend the previous order retroactively, it is plain that the Government's window of opportunity to intervene under § 3730(b) closed irrevocably.

The declaration of the Government's principal local counsel in this case, Assistant United States Attorney Juliet Eurich, recites that, on March 3, 1992, "I signed the government's Motion and Memorandum and *made sure* the papers were placed in the night filing box in the lobby of the Courthouse on the evening of March 4, 1992 after the Clerk's office had closed for the day." (Emphasis added.) The declaration goes on to state that three weeks later, after being notified by Judge Legg's secretary that no papers had come down from the Clerk's Office requesting a further extension, the Government caused the *nunc pro tunc* motion in question to be filed.

No evidence of the alleged March 4 filing appears on the Court's docket, which is the official index of filed papers ordained in Fed.R.Civ.P. 79(a). Nevertheless, it is possible that a filing might have been made, as defined in Fed.R.Civ.P. 5(e), even though the docket sheet does not reflect that filing. Given chronic understaffing of the Clerk's Office in this District, given the advent of computer-aided docketing with its concomitant "efficiency," and given human error, it is conceivable that papers filed with the Clerk's Office under Rule 5(e) might nonethe-

less fall into a Bermuda Triangle somewhere between their receipt and a judge's chambers, a misfortune that should not affect the substantial rights of litigants who have indeed filed under Rule 5(e).

The difficulty for the Government in this case is that Ms. Eurich's declaration does not adequately establish, by competent evidence, that the papers actually *were* filed with the Clerk's Office. Ms. Eurich's declaration simply says she "made sure" that the papers were placed in the night depository. This falls far short of the personal knowledge required to give the Court an adequate confidence level to find that a Rule 5(e) filing actually was made. *Cf.* Fed.R.Evid. 602. Without the testimony of someone with personal knowledge that the filing was in fact made, the declaration of Ms. Eurich is insufficient to prove the filing. (Precisely the same difficulty inheres in the declaration of Mr. Warwick as to a subsequent extension, which will be addressed below.)

The Government's attempt to cure the March 4 non-filing by the device of a *nunc pro tunc* motion and order does not suffice. The civil rule governing extensions of time obtained after the expiry of a prescribed filing time does not apply to filing times prescribed *by statute*, even though the computational part of the rule *does* apply to statutory time periods. *Compare* Fed.R.Civ.P. 6(a) *with* Fed.R.Civ.P. 6(b). Therefore, unless other law allows the cure of a missed filing deadline by a *nunc pro tunc* order, the March 27 order can be given no retroactive effect. Given the lack of evidence to establish that the Clerk simply neglected to record a filing that was in fact made, the March 27 order was not a proper *nunc pro tunc* order, in that, rather than correcting the record to show that an entry should have been made, it turned something that was not a matter of record into a matter of record after the fact. This is not an appropriate use of the *nunc pro tunc* device. *See, e.g., United States v. Taylor*, 841 F.2d 1300, 1308 (7th Cir.), *cert. denied*

sub nom. Rosentein v. United States, 487 U.S. 1236, 108 S. Ct. 2904, 101 L.Ed.2d 937 (1988).

Although, because of the March incident, it is not necessary to reach the August incident (where with the exception of a *nunc pro tunc* order, essentially the same thing happened), there is also insufficient evidence of filing as to the August motion, in that the declaration of Assistant U.S. Attorney Warwick simply recites that he gave the papers to his secretary for filing.

For these reasons, the defendant's motion to dismiss the United States as a party and to dismiss the amended complaint will be granted in an Order to be entered separately herein.

There remains the question of the relator's suit. Upon consideration, the Court is of the opinion that Mr. Siller's action is barred under the False Claims Act, in that the matters here in suit were based upon public disclosures in civil hearings, and Mr. Siller was not an original source within the statutory meaning of that term, as fleshed out by case law. *See* 31 U.S.C. § 3730(e)(4). As recognized in, *e.g.*, *United States ex rel. Doe v. John Doe Corp.*, 960 F.2d 318 (2d Cir. 1992); the public disclosure bar is an attempt to forestall opportunistic *qui tam* actions based on publicly available information.

In this case, the Court has little difficulty concluding that the 1989 Texas lawsuit filed by the SSI corporation (of which Mr. Siller's brother was president and with which the relator was associated) against Becton Dickinson publicly disclosed the underlying facts in a "civil hearing," as did a 1987 action in *pari materia* filed by another corporation. The Court is of the opinion that the term "civil hearing" is broad enough to include complaints filed in a civil case, even if the matter does not come to full trial or otherwise involve a judicial hearing. *See, e.g., United States ex rel. Stinson, Lyons v. Prudential Ins. Co.*, 944 F.2d 1149 (3d Cir. 1991). It is immaterial, given that the Government is not properly an

intervenor in this case, that the full gist of the relator's allegations was not contained in the underlying Texas complaint. *See United States ex rel. Precision Co. v. Koch Industries*, 971 F.2d 548, 552 (10th Cir. 1992). In this case, the 1989 Texas complaint stated, as relevant to the present motion:

> SSI would show that the prices quoted by BBL to the United States Government were not the best prices quoted to other customers and therefore violated the "Most Favored Customer" provision of its contract with the United States Government pursuant to GSA's 1982 Policy Statement on Multiple Award Schedule Programs and Title XII of the Defense Procurement Reform Act of 1984. BBL sold its products to private hospital and laboratory groups such as Bexar County Hospital and International Clinical Laboratories at a lower price and prevented SSI from servicing these hospitals by placing the distribution function with SSI's competitors in a conspiracy to monopolize the market and destroy SSI by restraining trade. SSI has suffered extensive damages from loss of business due to BBL's actions in prohibiting SSI from competing on the open market and wrongfully favoring SSI's competitors.

Count II, ¶ 9, Plaintiff's Original Petition, attached to defendant's Motion to Dismiss as Exhibit 6.

The Court is unimpressed with the relator's attempt to show that these allegations do not suffice to show fraud against the Government, in that they do not state with particularly the elements of fraud. The plain fact is that the SSI complaint accused the defendant of breaching its contract and a federal statute, which derives from exactly the same core of operative facts—overcharging the Government and not treating it as a "most favored customer"—that forms the basis for this *qui tam* complaint. Given the relator's position within SSI, this Court

has no difficulty concluding that this is the kind of opportunistic capitalization on prior, public litigative disclosures prohibited by the policy expressed in, *e.g.*, *Doe*, *supra*.

Furthermore, the Court is convinced that the plaintiff is not an original source, under the rule in *United States ex rel. Dick v. Long Island Lighting Co.*, 912 F.2d 13, 16 (2d Cir. 1990), which was followed by the Ninth Circuit in *Wang v. FMC Corp.*, 975 F.2d 1412 (9th Cir. 1992). The Court is not persuaded by the relator's attempts to distinguish those cases from this one. As a corporate insider of SSI, there is no contention that Mr. David Siller is the one who provided the information on which the suit was based to SSI, and his affidavit does not, fairly construed, permit such a conclusion. In fact, there is no indication that any of his observations formed the basis for the 1989 Texas suit by SSI, which in fact was essentially a "knock off" of a similar complaint previously filed by another dissatisfied Becton Dickinson distributor in 1987.

For all the reasons stated above, an order will be entered dismissing the United States as a party to this suit and dismissing its amended complaint, for lack of subject matter jurisdiction, and dismissing the original complaint, for failure to state a claim upon which relief can be granted and for lack of federal subject matter jurisdiction.

Supreme Court, U.S.
FILED
SEP 14 1994
OFFICE OF THE CLERK

No. 94-106

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

BECTON DICKINSON AND COMPANY,
Petitioner,

v.

UNITED STATES, *ex rel.* DAVID R. SILLER,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF FOR RESPONDENT DAVID R. SILLER IN OPPOSITION

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QUESTIONS PRESENTED

1. Did the Fourth Circuit correctly hold that a *qui tam* action under the False Claims Act, 31 U.S.C. §§ 3729 *et seq.*, is not "based upon" an earlier "public disclosure of allegations or transactions," where the relator did not derive his knowledge of the allegations or transactions from any "public disclosure"?

2. Did the Fourth Circuit correctly hold that a relator in a *qui tam* action is an "original source" within the meaning of 31 U.S.C. § 3730(e)(4), where the relator met both statutory criteria of that term, *i.e.*, he had "direct and independent knowledge of the information on which the allegations are based," and he "voluntarily provided the information to the Government before filing an action" based on that information?

3. May a district court, in its discretion, choose not to dismiss the Government from a *qui tam* action, where the Government has failed to comply with an earlier court-imposed deadline for electing whether to intervene in the action?

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

No. 94-106

BECTON DICKINSON AND COMPANY,
Petitioner,

v.

UNITED STATES, *ex rel.* DAVID R. SILLER,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF FOR RESPONDENT DAVID R. SILLER IN OPPOSITION

OPINIONS BELOW

Respondent incorporates by reference the Opinions Below section in the Petition for Writ of Certiorari.

JURISDICTION

Respondent incorporates by reference the Jurisdiction section in the Petition for Writ of Certiorari.

PERTINENT STATUTES

Respondent incorporates by reference the Pertinent Statutes section in the Petition for Writ of Certiorari.

STATEMENT OF THE CASE

1. The History of the False Claims Act.

The False Claims Act (the "Act") is the Government's primary tool for recovering monies lost as the result of fraud against the Government. *See* S. Rep. No. 345, 99th Cong., 2d Sess. at 2 (1986) ("S. Rep."), *reprinted in* 1986 U.S. Code Cong. & Admin. News 5266 ("USCCAN"). The Act provides that those who knowingly submit or cause the submission of false claims for payment by the federal Government, or who knowingly use false statements to get such claims approved, are liable for treble damages plus civil penalties of between $5,000 to $10,000 per false claim. 31 U.S.C. § 3729 (1992 Cum. Supp.).

Since its original enactment in 1863, the Act has contained a "*qui tam*" provision enabling a private citizen (the relator) to enforce the Act's provisions by filing a lawsuit as a private attorney general. *See United States ex rel. Williams v. NEC Corp.*, 931 F.2d 1493, 1496-98 (11th Cir. 1991). If the Government recovered in such a case, the relator was entitled to a percentage of the Government's recovery. The *qui tam* provision was conceived as a means to increase the Government's recoveries by encouraging citizens to report fraud "under the strong stimulus of personal ill will or in the hope of gain." *United States v. Griswold*, 24 F. 361 (D. Ore. 1885), *aff'd*, 30 F. 762 (C.C. Ore. 1887).

During the 1940s, citizens were filing *qui tam* actions based solely on information copied from criminal indictments. *See* S. Rep. at 8-10, USCCAN at 5273-75. This practice was upheld by the Supreme Court in *United States ex rel. Marcus v. Hess*, 317 U.S. 537, 545-48, 63 S.Ct. 379, 384-86 (1943). As a result of this practice, to prevent parasitic actons such as the one addressed in *Marcus*, Congress in 1943 amended the Act's *qui tam* provisions to bar any lawsuit based on information al-

ready in the possession of the Government at the time the lawsuit was filed. *See United States v. Pittman*, 151 F.2d 851, 853-54 (5th Cir. 1945), *cert. denied*, 328 U.S. 843 (1946); 31 U.S.C. §§ 3730(b)(4), 3730(c)(1) (1982) (superseded).

Congress overhauled the Act, including its *qui tam* provisions, in 1986. The purpose of the False Claims Amendments Act of 1986 was to increase the Government's ability to combat fraud by, among other things, expanding the *qui tam* provisions to encourage more private enforcement suits. S. Rep. at 23-24, USCCAN at 5288-89.

The revisions of the *qui tam* provisions were intended to serve two main objectives. First, Congress sought to encourage more private citizens to bring evidence and information about fraud to the Government's attention. Congress recognized that a major impediment to law enforcement efforts was a "conspiracy of silence" among employees of Government contractors, which conspiracy was fostered by various forums of retaliation against whistleblowers. S. Rep. at 5-6, USCCAN at 5270-71.

Second, Congress sought to encourage private citizens to contribute additional resources to the Government's actual prosecutorial efforts. The Senate Report accompanying the Act noted that "perhaps the most serious problem plaguing effective enforcement is a lack of resources on the part of Federal enforcement agencies. . . . [These amendments] which allow and encourage assistance from the private citizenry can make a significant impact on bolstering the Government's fraud enforcement effort." S. Rep. at 7-8, USCCAN at 5272-73.

In order to make it worthwhile for whistleblowers to report fraud and to assist in the Government's law enforcement efforts, Congress enacted several fundamental changes to the *qui tam* provisions. One of the most significant changes was to relax the Act's jurisdictional requirements so that any whistleblower with knowledge of

fraud—except for "parasitic" whistleblowers, such as the one in *Marcus*, who derived their knowledge entirely from certain public sources of information—was eligible to prosecute a *qui tam* suit.

Accordingly, Congress replaced the 1943 Act's "government knowledge" bar with 31 U.S.C. § 3730(e)(4), which provided:

> (A) No court shall have jurisdiction over an action under this section based upon the public disclosure of allegations or transactions in a criminal, civil, or administrative hearing, in a congressional, administrative, or Government Accounting Office report, hearing, audit, or investigation, or from the news media, unless the action is brought by the Attorney General or the person bringing the action is an original source of the information.
>
> (B) For purposes of this paragraph, "original source" means an individual who has direct and independent knowledge of the information on which the allegations are based and has voluntarily provided the information to the Government before filing an action under the section which is based on the information.

These two provisions are commonly referred to as the "public disclosure" bar and the "original source" exception to that bar.

2. The Origin of the Instant Case.

From January 1986 until after the filing of this lawsuit in January 1991, David R. Siller ("the relator") was an employee of Scientific Supply, Inc. ("SSI"), a distributor of health care products located in San Antonio, Texas. The president of SSI was Ruben Siller, the relator's brother. Until 1987, SSI was an authorized distributor of medical device products manufactured by the defendant, Becton Dickinson and Company ("BD"). Pet. App. 3a.

The relator became familiar with BD's marketing and sales practices through his employment with SSI. He was directly responsible for many sales to both U.S. Government and non-U.S. Government entities. Through his employment, the relator learned that BD routinely sold its products to the federal Government at prices higher than those charged to other entities. Pet. App. 3a-4a; J.A. at 47, ¶ 4.[1]

The relator first learned about the False Claims Act, including its *qui tam* provisions, in the Spring of 1990. After retaining counsel, on December 27, 1990, the relator voluntarily disclosed all the information and evidence he had concerning this case to the Department of Veterans' Affairs Office of Inspector General ("VA/OIG"). Pet. App. 4a. His comprehensive disclosure included, among other things, a detailed explanation of BD's alleged fraudulent scheme, numerous supporting documents, an estimate of the cost impact to the Government, a list of material witnesses and description of the information they might provide, and a proposed strategy for discovery. J.A. at 53-74. The relator did not obtain any of these materials as the result of any disclosure in a court proceeding. J.A. at 48, ¶ 7. The relator filed the instant lawsuit on January 4, 1990.

Prior to the relator's disclosure to the VA OIG, no agent of the United States Government had any knowledge of these fraud allegations against BD. J.A. at 51, ¶ 19.

3. The Prior Litigation Involving Becton Dickinson.

In 1989, and 1987, respectively, SSI and another BD distributor, Statim Laboratory Supply, Inc. ("SLS"), filed separate lawsuits against BD in Texas state court. Although the gist of each complaint was to recover damages

[1] Citations to "J.A." refer to the Joint Appendix filed in the court below.

arising from BD's alleged wrongful termination of a distributorship, each complaint also included an allegation that BD had sold items to the Government at prices higher than those charged to other customers. Pet. App. 3a; J.A. at 79-99.

BD settled the SSI lawsuit in September 1989 and the SLS lawsuit in March 1990. In each settlement agreement, at the insistence of BD, the parties agreed to keep the terms and existence of the settlement confidential. Pet. App. 3a.

The SLS and SSI lawsuits alleged nothing about BD's sales and marketing practices that the relator had not already known from his own experience selling BD products to Government and non-Government entities. From his sales work at SSI, and well prior to the SLS and SSI lawsuits, the relator had known of the differentials between the prices BD offered to the federal Government and those BD offered to other customers. Pet. App. 4a; J.A. at 47, ¶ 6.

Although the relator knew of the existence of the SLS and SSI lawsuits, prior to his receipt of BD's Motion to Dismiss filed in the instant case in January 1993, he had not read any of the pleadings filed in those actions. J.A. at 48, ¶ 7.

4. The Procedural History of this Case.

As required by the Act, on January 4, 1991, the relator filed this case under seal to give the Government an opportunity to investigate the case and decide whether to intervene.[2] In October 1992, the United States inter-

[2] Under the Act, the relator must file the complaint under seal and serve a copy of the complaint, as well as a written disclosure of material information and evidence supporting the complaint, on the Department of Justice. The defendant is not served at the commencement of the action. The complaint remains under seal for a 60-day period, subject to unlimited extensions for "good cause," during which time the Government investigates the relator's alle-

vened and this lawsuit was unsealed. The United States and the relator jointly filed an Amended Complaint on December 16, 1992. In January 1993, this case was reassigned from Judge Benson E. Legg to Judge Frederic N. Smalkin.

On January 19, 1993, the defendant filed a Motion to Dismiss both the United States and the relator. On February 10, 1993, Judge Smalkin, without holding an evidentiary hearing, granted the defendant's motion in its entirety.

Judge Smalkin dismissed the United States as a party to the case on the grounds that Judge Legg had exceeded his judicial authority by granting a *nunc pro tunc* request by the Government, dated March 26, 1992, for an extension of the time in which to consider whether to intervene.[3] Judge Smalkin dismissed the relator's lawsuit on the grounds that it was jurisdictionally barred under the False Claims Act.

On appeal, the Fourth Circuit reversed as to the Government, and vacated and remanded as to the relator. The Fourth Circuit held that the Government's failure to file a timely request for an extension was not juris-

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gations. Once the Government has had a chance to investigate, the Government may intervene in the case and prosecute it as the primary plaintiff, in which case the relator is still permitted to participate as a co-plaintiff; or the Government may decline to intervene, in which case the relator may continue to pursue the case on the Government's behalf.

[3] The United States contended that it had filed a timely motion for the extension on March 4, 1992, but that the district court clerk had misplaced the motion. Although the relator was served with the original motion for extension prior to the expiration of the relevant extension, and the Assistant United States Attorney submitted an affidavit saying she had "made sure" the original motion was filed on March 4, Judge Smalkin concluded that the Government failed to demonstrate compliance with the March 4 deadline and that Judge Legg had exceeded the court's jurisdiction in granting the Government's subsequent *nunc pro tunc* motion.

dictional, and that Judge Legg had properly exercised his discretion by granting the Government's *nunc pro tunc* request for an extension. The court held that the relator's action should not have been barred unless the relator learned of his allegations from the prior litigative disclosures, and remanded for a factual determination on that issue. The court further held that the district court had misinterpreted the "original source" rule, improperly adding a third requirement which Congress had not included in the explicit statutory criteria for "original source." [4]

REASONS FOR DENYING THE PETITION

As BD points out, there is a conflict among the Circuit Courts in the interpretation of the phrase "based upon," as well as the definition of "original source." Nonetheless, there are two reasons this Court should deny BD's Petition. First, this case presents an awkward procedural backdrop against which to resolve these legal issues: Unless the Court also reviews and reverses the Fourth Circuit's holding on the Government's intervention in this case, the resolution of the issues concerning the relator's participation will not relieve BD of its burden of litigating this case against the Department of Justice.[5] Second, if BD's Petition is granted, this Court

[4] BD erroneously states that the Fourth Circuit reversed as to the relator and held that the relator was an "original source of the information." *See* Pet. at 10-11. In fact, the Fourth Circuit remanded as to the relator and did not expressly determine whether Mr. Siller actually satisfied the two statutory criteria for an "original source."

[5] The relator submits that BD's Petition is completely without merit as to the Government's failure to seek a timely extension of the deadline for electing whether to intervene. There is no conflict among the Circuit Courts on that issue, and the Fourth Circuit's opinion was based on a straightforward interpretation of Supreme Court precedent. Because the Department of Justice will address that issue in its Opposition to BD's Petition, the relator will not address that point any further herein.

will simply have to affirm the Fourth Circuit's holding on the basis of a well-settled principal of law: that courts must give effect to a statute's unambiguous plain language.

I. BECAUSE OF ITS PROCEDURAL POSTURE, THIS CASE IS INAPPROPRIATE FOR RESOLVING THE CONFLICTS.

In *all* of the Circuit Court cases that BD argues are in conflict with the Fourth Circuit's opinion, the Government had declined to intervene and the relator was continuing the prosecution of the case on his own. *See United States ex rel. Springfield Terminal Ry. Co. v. Quinn*, 14 F.3d 645 (D.C. Cir. 1994); *United States ex rel. Kriendler & Kriendler v. United Technologies Corp.*, 985 F.2d 1148 (2d Cir.), *cert. denied*, 113 S. Ct. 2962 (1993); *Wang v. FMC Corp.*, 975 F.2d 1412 (9th Cir. 1992); *United States ex rel. Precision Co. v. Koch Industries, Inc.*, 971 F.2d 548 (10th Cir. 1992), *cert. denied*, 113 S. Ct. 1364 (1993); *United States ex rel. Doe v. John Doe Corp.*, 960 F.2d 318 (2d Cir. 1992); *United States ex rel. Dick v. Long Island Lighting Co.*, 912 F.2d 13 (2d Cir. 1990). In those cases, the dismissal of the relator meant the end of the litigation.

By contrast, in this case the Government has intervened and has the "primary responsibility for prosecuting the action." 31 U.S.C. § 3730(c)(1). Thus, in the event the Court declines to review the portion of the Fourth Circuit's opinion reinstating the Government as a party, BD will have to contest the merits of this case against the Department of Justice—no matter what the outcome of BD's efforts to dismiss the relator.

If BD must litigate the merits of this case against the Government, BD will have a significantly diminished incentive to continue seeking the dismissal of the relator. Because the relator's share would come from the Government's recovery, *id.* at § 3730(d)(1), the presence or absence of the relator would not enhance or lessen BD's

underlying liability. Moreover, if the Government offers to settle this case on terms that BD considers reasonable, BD might simply decide to abandon its efforts to dismiss the relator.

The better alternative is for the Court to grant certiorari to review these issues in a case in which the Government has *declined* to intervene. In that situation, the resolution of these issues could be dispositive of the litigation, and both parties would have every incentive to litigate the issues until a decision is reached.

II. THE FOURTH CIRCUIT'S INTERPRETATION OF § 3730(e)(4) IS IN ACCORDANCE WITH ITS PLAIN LANGUAGE AND LEGISLATIVE HISTORY.

Another reason for denying BD's Petition is that the Fourth Circuit simply interpreted the unambiguous plain language of 31 U.S.C. § 3730(e)(4) as it is written—just as this Court requires. *See United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 241, 109 S. Ct. 1026, 1030 (1989). Moreover, the Fourth Circuit's reading of the plain language is fully supported by the legislative history of the 1986 Amendments.

A. The Fourth Circuit Properly Interpreted "Based Upon."

Under the language of § 3730(e)(4)(A), the jurisdictional bar applies only to lawsuits that are "based upon the public disclosure of allegations or transactions" in certain enumerated forums. The instant lawsuit was not "based upon the public disclosure of allegations or transactions" in the prior litigation involving SSI or SLS; rather, the relator based this lawsuit upon his personal knowledge derived through his employment with a BD distributor.

BD contends that this case should be barred because the relator's allegations echoed the allegations by SSI and SLS that had been publicly disclosed. However, as the

Fourth Circuit noted, a "reading of 'based upon' as meaning 'derived from' is the only fair construction of the statutory phrase." Pet. App. 18a.

The plain language of § 3730(e)(4)(A) is also consistent with the legislative history of the 1986 Amendments. The "public disclosure" bar was intended to be less restrictive than its predecessor, the "government knowledge" bar of the 1943 Act. The new provision was intended to bar "parasitic" relators who would simply parrot back to the Government information obtained from a public record—information which the Government already had or could have just as easily obtained for itself. Thus, for example, the new provision would bar the relator in *Marcus*, a total stranger to the fraud who simply copied a criminal indictment and filed the allegation as a *qui tam* suit.

However, the new provision was not intended to bar lawsuits by insiders who, unlike members of the public-at-large, could provide new evidence, information, or testimony to the Government. The Senate Report accompanying the 1986 Amendments emphasized the need for insiders not only to trigger new fraud investigations, but also to assist ongoing fraud investigations by providing additional evidence and resources. S. Rep. at 7-8, USCCAN at 5272-73.

The instant case is a prime example of the kind of conduct the Amendments sought to encourage: Notwithsanding any prior "public disclosure" of BD's alleged misconduct, the Government was totally unaware of the allegation prior to the relator's coming forward. The relator's inside information included BD pricing records, documentary evidence of BD's attempts to conceal its scheme, and detailed descriptions of other material documents and witnesses—none of which information had been produced or made part of a public record in the SSI or SLS litigation. This inside information gave the

Government's investigation a running start, and the Government ultimately intervened in the case.

Someone who was a stranger to BD's fraud—a person who just happened to discover the SSI or SLS complaints in the county courthouse—could not have provided the Government with such comprehensive information, and would have been barred from proceeding under the Act. However, neither the language nor the legislative history of the Act indicates that Congress intended to bar an insider such as Mr. Siller—who was able to provide information well beyond the bare allegations contained in the SSI and SLS complaints—because of the mere happenstance that those bare, unsupported allegations were part of a public record.

B. The Fourth Circuit Properly Construed "Original Source."

Likewise, the Fourth Circuit correctly interpreted the unambiguous plain language of 31 U.S.C. § 3730(e)(4)(B), the "original source" provision. That provision explicitly defines "original source" as a person who (1) has "direct and independent knowledge of the information on which the allegations are based," and (2) "voluntarily provided the information to the Government" before filing a *qui tam* action based on the information. The relator fulfilled both of these criteria.

BD contends that § 3730(e)(4)(B) should have included a third criterion, *i.e.*, that prior to any public disclosure of the information, an "original source" must have provided the information to the entity that made the disclosure. In other words, BD argues that Congress did not really mean to require an "original source" to provide information to the "*Government* before *filing* the [*qui tam*] action," *id.* (emphasis added), but instead, Congress meant to require an original source to provide the information to a *non-Governmental* entity prior to the *disclosure* of the information by that entity.

Although BD recognizes that this third criterion is not included in the statute itself, BD counsels this Court to do precisely what this Court has said it will not do: to enlarge a statute " 'so that what was omitted, presumably by inadvertance, may be included within its scope. To supply omissions transcends the judicial function.' " *West Virginia University Hospitals, Inc. v. Casey*, 499 U.S. 83, 101 (1991), quoting *Iselin v. United States*, 270 U.S. 245, 250-51 (1926) (Brandeis, J.).

If the Court grants BD's Petition, the Court will be required to come to the same conclusion it has so many times: that Congress writes the laws, not the courts. Because this basic proposition need not be restated once again, the Court should deny BD's Petition.

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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Supreme Court, U.S.
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No. 94-106

In the Supreme Court of the United States

OCTOBER TERM, 1994

BECTON DICKINSON AND COMPANY, PETITIONER

v.

UNITED STATES, EX REL. DAVID R. SILLER

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

The United States will address the following question:

Whether the *qui tam* provisions of the False Claims Act, 31 U.S.C. 3729 *et seq.*, preclude a district court from granting the government's out-of-time motion for additional time to determine whether it will intervene in litigation brought under the Act.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-34a) is reported at 21 F.3d 1339. The opinion of the district court (Pet. App. 35a-40a) is reported at 813 F. Supp. 410.

JURISDICTION

The judgment of the court of appeals was entered on April 18, 1994. The petition for a writ of certiorari was filed on July 15, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In the False Claims Act, 31 U.S.C. 3729 *et seq.*, Congress provided a cause of action against those who knowingly present false claims for payment to the

United States. 31 U.S.C. 3729. The Act is the government's primary litigative tool to recoup losses sustained as the result of fraud against the government. See S. Rep. No. 345, 99th Cong., 2d Sess. 2 (1986) (Senate Report). The statute requires the Attorney General to investigate violations of the Act diligently, and authorizes the Attorney General to bring suit for violations to recover treble damages and civil penalties. 31 U.S.C. 3729 and 3730(a). The Act also provides, in Section 3730(b), for "actions by private persons." The Act permits the private "relator" in these "*qui tam*" cases to recover a share of the proceeds of the action in the event that the suit is successful. 31 U.S.C. 3730(d).

As amended in 1986, the *qui tam* provisions of the Act permit a private litigant to commence an action on behalf of the United States by serving the Attorney General with "[a] copy of the complaint and written disclosure of substantially all material evidence and information" in the relator's possession and by filing the complaint in camera in a district court. 31 U.S.C. 3730(b)(2). The complaint remains under seal for an initial period of at least 60 days and may not be served on the defendant except by order of the court. *Ibid.*

The period during which the complaint remains under seal is intended to provide the government with an "adequate opportunity to fully evaluate the private enforcement suit" and to determine "whether it is in the Government's interest to intervene and take over the civil action." Senate Report at 24. The statute provides that the government "may, for good cause shown, move the court for extensions of the time during which the complaint remains under seal." 31 U.S.C. 3730(b)(3). The Act permits the government to make its showing of "good cause" for an enlargement of the period upon affidavits or other submissions in camera. *Ibid.* The

length of any enlargement is left to the discretion of the court.

The statute further provides that

> Before the expiration of the 60-day period or any extensions obtained under [Section 3730(b)(3)], the Government shall—
>
> (A) proceed with the action, in which case the action shall be conducted by the Government; or
>
> (B) notify the court that it declines to take over the action, in which case the person bringing the action shall have the right to conduct the action.

31 U.S.C. 3730(b)(4).

If the Attorney General elects to join a *qui tam* suit, the Department of Justice takes on primary responsibility for prosecuting the action and is not bound by any act of the relator. 31 U.S.C. 3730(c)(1). If the Attorney General declines to join the suit, the Act authorizes the relator to conduct the litigation on his own. 31 U.S.C. 3730(c)(3).

2. The United States Department of Veterans Affairs (VA) is charged with responsibility for negotiating and administering contracts to procure pharmaceutical and diagnostic products to supply VA hospitals and other federal government facilities. Petitioner manufactures and sells such products to the government under contracts with the VA. Pet. App. 39a. Respondent David Siller was an employee of Scientific Supply, Inc., a company that formerly distributed petitioner's products. *Id.* at 3a.

On December 27, 1990, Siller disclosed to the Office of the Inspector General for the VA evidence that he believed demonstrated that petitioner had overcharged

the government. Pet. App. 4a. In January, 1991, Siller filed a *qui tam* complaint and served the Attorney General. *Ibid.* Siller alleged that petitioner had violated the Act and defrauded the VA by certifying that it was selling diagnostic products to VA hospitals at prices at least as favorable as those available to its most favored commercial customers, when in fact petitioner knew that it was providing these products at substantially lower prices to commercial customers. *Id.* at 39a. The case remained under seal for 21 months while the VA and the United States Department of Justice actively investigated Siller's allegations. *Id.* at 4a. During that time the government moved for, and obtained, eight extensions of time in which to consider whether to intervene. *Ibid.*

3. On two occasions, the government filed a motion to extend the period for intervention after a previous court-ordered extension had lapsed. Pet. App. 4a. On the first occasion, United States District Judge Benson Legg had set a deadline of March 4, 1992, for the government to intervene or to move for a further extension of the time permitted to intervene. *Ibid.* Three weeks after the March 4 deadline, the Assistant United States Attorney assigned to the matter was notified by the court that no papers had been received. She then filed a motion for an order enlarging, *nunc pro tunc*, the time permitted for the United States to intervene. Judge Legg granted this motion on March 27, 1992. *Id.* at 5a. The Assistant United States Attorney subsequently filed an affidavit stating that she had caused a motion for a further extension to be placed in the night filing box in the clerk's office on March 4. *Id.* at 4a-5a.

On a second occasion, Judge Legg had entered an order maintaining the seal on the case until August 3, 1992. Pet. App. 5a. The United States did not file a motion to

extend the period for intervention until August 5. *Ibid.* Judge Legg nevertheless granted the motion, setting a deadline of October 5, 1992, for the government to make its election. *Ibid.* On October 5, the government filed a notice of election to intervene and notice of appearance. *Ibid.*

4. After the complaint was served, petitioner moved to dismiss the United States as a party to the action. Petitioner argued that the government's failure to notify the court of a decision to intervene, or to move the court for an extension of the time to intervene, before a previous extension of the period for intervention had lapsed, barred prosecution of the suit by the government. Pet. App. 5a. Petitioner also argued that Siller was barred from proceeding with the action on the ground that he had based his complaint on allegations or transactions that had been disclosed in civil suits filed against petitioner before Siller filed his *qui tam* complaint. See 31 U.S.C. 3730(e)(4)(A).

The action was transferred from Judge Legg to Judge Frederic N. Smalkin. Pet. App. 5a. Although Judge Legg had granted the requested extensions of time notwithstanding their untimely filing, Judge Smalkin dismissed the action for want of subject matter jurisdiction, concluding that Judge Legg had acted without authority in granting extension motions filed after previously granted extensions had expired.[1] *Id.* at 35a-38a, 40a. Judge Smalkin thus concluded that "the Government's window of opportunity to intervene * * * closed irrevocably" on the first occasion when a court-ordered extension lapsed without the filing of a notice or motion by the United States. *Id.* at 36a. The court also

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[1] The district court rejected the government's position that in fact the motions had been timely filed. Pet. App. 36a-38a.

dismissed the complaint filed by the relator, ruling that the suit had been based upon allegations publicly disclosed in prior civil hearings and that Siller was not the "original source" of the allegations. See *id.* at 38a-40a (citing 31 U.S.C. 3730(e)(4)).

5. Both the United States and Siller appealed. The court of appeals reversed the district court's judgment concerning the government's intervention in the suit and vacated that part of the district court's order dismissing Siller's *qui tam* complaint. Pet. App. 34a. With respect to the government's right to intervene and proceed with the case, the court concluded that the intervention period provided by operation of 31 U.S.C. 3730(b)(4) is not jurisdictional. Pet. App. 15a. The court of appeals found that the only textual evidence that Congress intended Section 3730(b)(4) to be jurisdictional is the statutory requirement that the government "shall" proceed with the action before the expiration of the 60-day period for intervention or any extensions of that period granted by the court. Pet. App. 10a. Relying on *Brock* v. *Pierce County*, 476 U.S. 253 (1986), the court of appeals held that "th[e] use of the word 'shall' is insufficient evidence of a congressional intention that section 3730(b)(4) serve as a jurisdictional requirement upon the government in *qui tam* actions." Pet. App. 15a. The court stated as well that it found "nothing in the [False Claims Act's] history or purpose suggesting that Congress did intend a jurisdictional requirement." *Ibid.* The court of appeals therefore held that "the government's failure to comply with section 3730(b)(4) does not bar its further prosecution of a *qui tam* action." Pet. App. 15a.

ARGUMENT

The decision of the court of appeals with respect to the government's intervention in this suit is fully consistent with this Court's decisions and does not conflict with decisions of any other court of appeals. Nor has petitioner demonstrated that the failure of the United States to file timely requests for extensions of the intervention period in False Claims Act *qui tam* cases is a substantial and recurring problem of such importance as to warrant exercise of this Court's certiorari jurisdiction.[2]

1. Petitioner argues (Pet. 17-18) that the court of appeals disregarded the requirements of 31 U.S.C. 3730(b)(4) and "dangerously extend[ed]" the limits established by the Court in *Pierce County* for determining when and in what manner statutory deadlines are enforceable against the government. Petitioner's argu-

[2] The first and second questions presented by the petition address the court of appeals' decision to vacate the district court's dismissal of respondent Siller's *qui tam* complaint. The United States did not address those issues in the court of appeals, and we express no view as to their proper resolution. We note, however, that if (as we urge) this Court denies certiorari with respect to the third question presented by the petition, the first and second questions will have limited significance in the instant case. Now that the United States has taken over the prosecution of the action, the suit against petitioner will go forward with or without the relator. We note as well that the decision as to whether respondent Siller is a proper relator is interlocutory: the court of appeals vacated the judgment that had been entered in petitioner's favor concerning Siller's participation, and remanded the case to the district court to determine whether Siller is a proper relator under its ruling. See Pet. App. 22a, 34a. The present case therefore appears to furnish an inappropriate vehicle for this Court's resolution of the first and second questions presented by the petition.

ment assumes that, unless the sanction for failure to comply with a deadline on Executive Branch action is the loss of all power to act, statutes prescribing such deadlines are meaningless. This Court has rejected that proposition, concluding instead that "[t]here is no presumption or general rule" that for every duty imposed upon the government, there must exist some punitive sanction for departures or omissions. *United States* v. *Montalvo-Murillo*, 495 U.S. 711, 717 (1990). To the contrary, federal statutory provisions imposing procedural duties on federal officials must be construed in light of the "great principle of public policy * * * which forbids that the public interests should be prejudiced by the negligence of the officers or agents to whose care they are confided." *Id.* at 718 (quoting *Pierce County*, 476 U.S. at 260, and *United States* v. *Nashville, C. & St. L. Ry.*, 118 U.S. 120, 125 (1886)). Accordingly, "if a statute does not specify a consequence for non-compliance with statutory timing provisions, the federal courts will not in the ordinary course impose their own coercive sanction." *United States* v. *James Daniel Good Real Property*, 114 S. Ct. 492, 506 (1993). Cf. *Montalvo-Murillo*, 495 U.S. at 721 ("We do not agree that we should, or can, invent a remedy to satisfy some perceived need to coerce * * * the Government into complying with the statutory time limits.").

In *Pierce County*, the Court reaffirmed the long-standing principle that, where important public rights are at stake, a failure to observe a procedural requirement does not bar subsequent agency action unless it appears that Congress intended such a result. Thus, the statutory requirement that the government "shall" comply with a specified procedure does not compel the conclusion that the government's failure to do so results in a loss of the power to act. 476 U.S. at

260; accord *Montalvo-Murillo*, 495 U.S. at 718. Rather, the courts must look to other indicia of congressional intent before concluding that a statutory deadline is jurisdictional. *Pierce County*, 476 U.S. at 259-265.

The Fourth Circuit closely followed that approach in the instant case. The court of appeals found that here, as in *Pierce County*, use of the word "shall" provided insufficient textual evidence that Congress intended Section 3730(b)(4) to act as a jurisdictional provision. Pet. App. 15a. The statute does not specify any consequences for failure to meet the statutory deadlines. The court of appeals did not hold that the statutory intervention deadline is "meaningless" (Pet. 17), or that a district court "may not enforce the deadline" against the government. See Pet. 4. To the contrary, the court found that a district court confronted with a breach of the procedures described in Section 3730(b) may enter an order compelling the government to comply with the statutory deadline, or construe the government's failure to comply as an election under Section 3730(b)(4)(B) to decline to take over the action.[3] Pet. App. 11a. Those remedies are fully adequate to redress the injury, if any,

[3] The court of appeals expressly reaffirmed that district courts retain the discretion to decline to grant to the government enlargements of the time permitted for intervention requested under Section 3730(b)(3). See Pet. App. 15a n.7. The court also did not question the authority of the district courts to deny the government the right to proceed with an action because of repeated noncompliance with orders of the court. *Ibid.* In the instant case, however, the district court granted both of the disputed requests for enlargements of the intervention period. The question before the court of appeals was whether the district court had the *discretion* to grant motions presented after the previous enlargement had lapsed—not whether the district court was compelled to do so.

resulting from the government's failure to intervene or to move for additional time to intervene in a timely fashion.

2. In accordance with this Court's decision in *Pierce County*, the court of appeals also looked to other indicia of congressional intent to ascertain whether, despite the absence of any stated consequence for a failure to meet the deadlines set under Section 3730(b)(4), the statute should be construed to impose an absolute bar on untimely requests to extend the time for intervention. Pet. App. 11a-12a.[4] The court found petitioner's argument to be unsupported by the history and purpose of the False Claims Act. *Id.* at 12a-13a. Petitioner contends that the court of appeals disregarded Congress's desire, stated in the legislative history of the 1986 amendments, for prompt action by the Attorney General on *qui tam* complaints. Petitioner asserts (Pet. 21) that a "broader and more substantive reading" of the statute and the legislative history would reveal an intention to create a remedy for defendants in *qui tam* cases for delay by the government while the case is under seal. That argument is without merit.

The Senate Report accompanying the 1986 amendments stressed that extensions of the period during which the government must decide whether to intervene and take over the litigation should be weighed carefully.

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[4] The court of appeals acknowledged that this Court's recent decision in *James Daniel Good* might plausibly be read to "render[] unnecessary any resort to legislative history where Congress has not specified the consequence of dismissal for the government's failure to meet a statutory deadline." Pet. App. 11a n.5. The court ultimately concluded, however, that the opinion in *James Daniel Good* was ambiguous on this point and that examination of the legislative history (in accordance with this Court's analysis in *Pierce County*) was therefore appropriate. *Ibid.*

Senate Report at 24. Judicial control over the intervention deadlines was intended, however, as a means of ensuring that private *qui tam* plaintiffs receive a reasonably prompt decision regarding intervention by the government. See *id.* at 3-6, 24. The legislative history of the *qui tam* provisions does not suggest that the statutory time limits for intervention by the Department of Justice were intended to provide *defendants* in fraud cases with additional procedural protections. Putative False Claims Act defendants are protected from undue delay by the government in instituting suit in the usual manner in which the law affords protection against stale claims: through a statute of limitations. See 31 U.S.C. 3731(b). There is no basis for construing the period provided for intervention pursuant to 31 U.S.C. 3730(b)(4) as an additional limitations period. See *James Daniel Good*, 114 S. Ct. at 506-507. Accordingly, review of the third question presented in the petition is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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